

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1912.

No. ~~293~~. 369

THE UNITED STATES, PLAINTIFF IN ERROR,

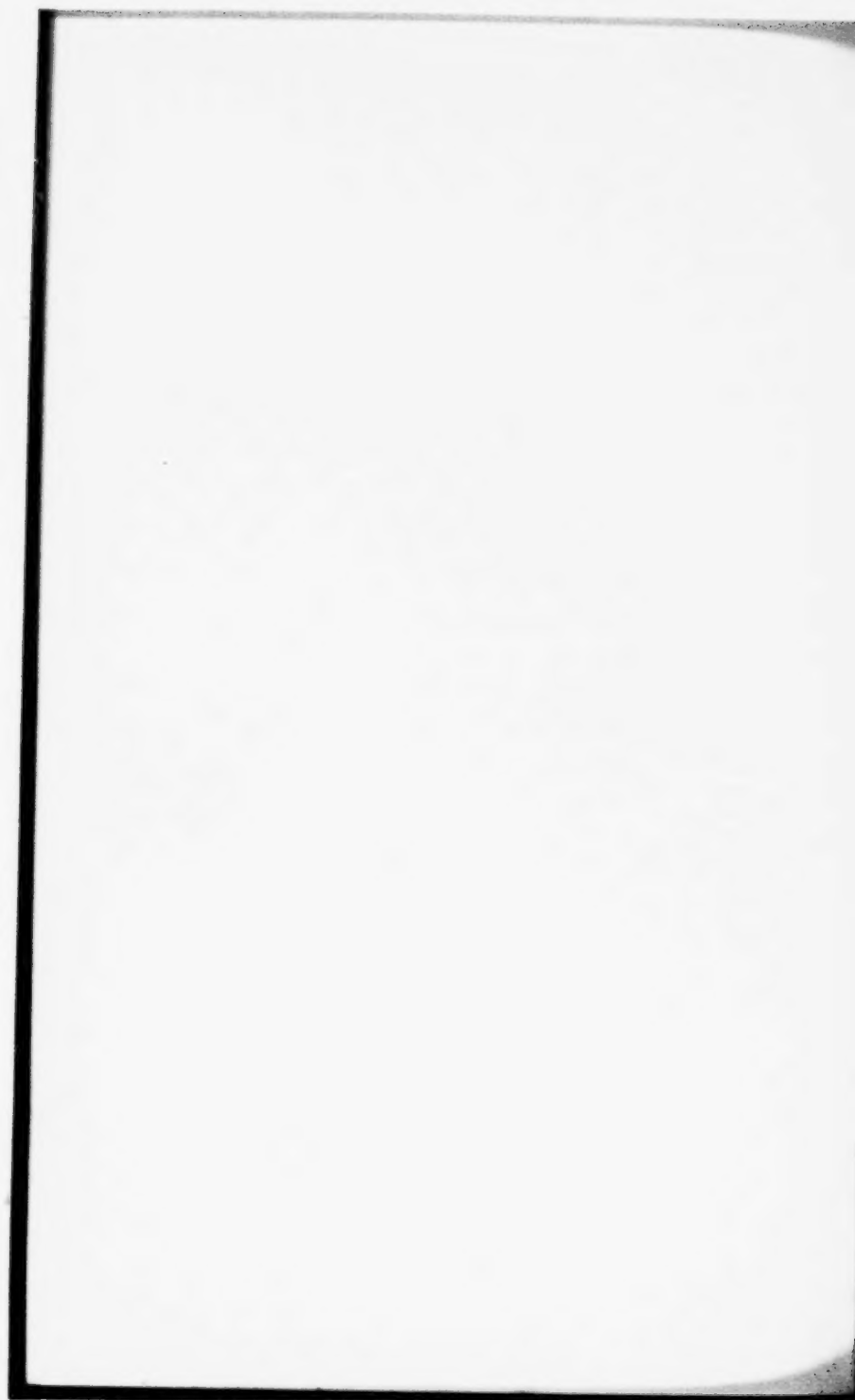
vs.

BUFFALO PITTS COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT.

FILED OCTOBER 23, 1912.

(28408.)



SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1912.

No. 828.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

BUFFALO PITTS COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT.

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United States Circuit Court.

WESTERN DISTRICT OF NEW YORK.

1

BUFFALO PITTS COMPANY,

Plaintiff,

AGAINST

UNITED STATES OF AMERICA,

Defendant.

Petition.

To the Honorable Judges of the Circuit Court²
of the United States for the Western District
of New York:

The petition of the Buffalo Pitts Company, by
its attorneys, Messrs. White & Babcock, respec-
tfully shows upon information and belief:

FIRST: That your petitioner, the Buffalo
Pitts Company, is a domestic corporation duly
created and organized under the laws of the State
of New York, that its full name is as aforesaid³
and that its residence, so far as such corporation
may have a residence, and its principal place of
business is at the corner of Fourth and Carolina
Streets, in the City of Buffalo and State of New
York.

4 SECOND: That your petitioner makes claim against the Government of the United States and brings its suit pursuant to the provisions of an Act of Congress, approved March 3, 1887, and the acts amendatory thereof, which claim is founded upon the facts hereinafter stated, and the contract arising therefrom and is brought to recover damages in a case not sounding in tort.

5 THIRD: That prior to the 20th day of May, 1905, your petitioner was the owner of a valuable engine which it had manufactured for sale, to wit.: a Buffalo Pitts 22 horse-power double cylinder, special traction engine, No. 6659, with the usual appurtenances and equipment, and that on or about said 20th day of May, 1905, your petitioner delivered said engine to the Taylor-Moore Construction Company at or near the town of Roswell, in the County of Chaves, and Territory of
6 New Mexico, under an agreement of sale by the terms of which the said Construction Company executed and delivered to your petitioner a chattel mortgage upon said engine and appurtenances as security for part of the purchase price thereof in the amount of sixteen hundred dollars (\$1,600.00) payable in instalments with interest as set forth in said mortgage, which expressly provided, among other things, that if default should
7 be made in the payment of said sum of money or the interest thereon, or if said mortgagee should at any time deem itself unsafe or insecure, the whole amount should be considered immediately due and payable, and your petitioner was

authorized to take and remove said property and 8
hold or sell and dispose of the same and all equity
of redemption as more fully set forth in said
mortgage, a copy of which is hereto annexed and
made part of this petition.

That on or about the 22nd day of May, 1905,
at 9:30 A. M., the said chattel mortgage was duly
filed for record and recorded in the office of the
Probate Clerk and ex-officio Recorder in and for 9
the said County of Chaves and Territory of New
Mexico, and thereby due notice was given accord-
ing to law unto the Government of the United
States and all persons interested in respect to
the rights of your petitioner in said property.

That within a few days thereafter the said
engine was put to work by said Taylor-Moore
Construction Company upon the so-called Hondo
Project being part of the Reclamation Service
undertaken by the Department of the Interior of 10
the United States which work was being prosecut-
ed under a contract between the United States
and said Taylor-Moore Construction Company,
dated December 4, 1904.

That the said Construction Company on or
about the 7th day of June, 1905, having become
insolvent, assigned to the United States all its
interest in said contract, and the United States
on that date took possession of all material, sup- 11
plies and equipment belonging to said Construc-
tion Company, including the aforesaid engine and
appurtenances, under the provisions of said con-
tract, but subject to the rights reserved to your
petitioner by said chattel mortgage.

- 12 That the said mortgagor thereby and by its other acts and omissions in the premises made default in the conditions of said mortgage, and the mortgagee thereby was rendered and deemed itself unsafe and insecure in respect to the money owing for such property, and so became entitled to the possession thereof, and thereupon your petitioner lawfully demanded from the United States through its proper representatives the return of said
- 13 engine to your petitioner, but the representatives of the United States being desirous of continuing the use of said engine in the completion of said work, refused said demand and put off the return of said engine, at the same time stating to your petitioner's agent that in their opinion the Government would do what was right in the matter, and within a few days either give up possession or pay your petitioner what was due upon
- 14 the engine.

- That relying upon such representations your petitioner waited until the month of September, 1905, when an agent of your petitioner was sent to said town of Roswell, N. M., with instructions to take the property in charge and advertise and sell it in the manner provided by the mortgage, and upon arrival at said place said agent had an
- 15 interview with the representative of the Government having the matter in charge, who requested that no action be taken looking to the recovery of the property, but that it be permitted to remain in the use of the Government in order to accomplish the work which had been left undone by the

Construction Company, and represented that if 16
the Government were permitted to use it the Government would pay for the property, because its use was necessary and probably indispensable in the work to be done.

That accordingly your petitioner complied with said request and permitted said property to remain in the possession of the Government, and the same was used by the Government in the completion of said work, and was not returned 17
to your petitioner until on or about the 21st day of June, 1906.

That the fair market value of said engine and appurtenances at the time it was taken by the Government as aforesaid was eighteen hundred and twenty dollars (\$1,820.00) and the fair market value of the same property when returned by the Government to your petitioner as aforesaid was not more than five hundred dollars (\$500.00). 18
That the fair and reasonable value of the use and occupation of said property in the meantime was thirteen and twenty dollars (\$1,320.00) and by reason of the facts stated your petitioner has suffered damage in said amount, with interest thereon from June 21, 1906, no part of which has been paid.

That the said Taylor-Moore Construction Company made default in respect to each and every 19
payment required by said chattel mortgage and no part thereof has been paid.

WHEREFORE, your petitioner prays for judgment upon the facts and law and for a recovery

20 against said United States of the sum of thirteen hundred and twenty dollars (\$1,320.00) with interest at eight per cent. (8%) from June 21, 1906, besides the costs and disbursements of this action.

BUFFALO PITTS COMPANY,

Petitioner,

By WHITE & BARCOCK,

21

Attorneys for Petitioner,
Office and P. O. Address
100 Erie Co. Bank Bldg.,
Buffalo, N. Y.

STATE OF NEW YORK, }
COUNTY OF ERIE, }
City of Buffalo, } ss.:

22 CHARLES M. GREINER, being duly sworn says that he is an officer of the above-named petitioner, Buffalo Pitts Company, namely its president, that the foregoing petition is true to his knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

CHARLES M. GREINER,

23

Subscribed and sworn to before me
this 28th day of June, 1910.

JENNIE W. RUSSELL,
Notary Public.

CHATTEL MORTGAGE.

TAYLOR-MOORE CONSTRUCTION COM-
PANY TO BUFFALO PITTS
COMPANY.

This indenture made and entered into this . . . day of May in the year one thousand nine hundred and five by the Taylor Moore Construction Company of the Town of Roswell, County of Chaves, Territory of New Mexico, mortgagor, to 25 Buffalo Pitts Company, a body corporate under the laws of the State of New York, mortgagee, WITNESSETH, that the Mortgagor being justly indebted to the Mortgagee in the sum of sixteen hundred no/100 dollars, which sum is hereby confessed and acknowledged to be due and payable by the Mortgagor to the Mortgagee, over and above all offsets and counterclaims, have for the purpose of securing the payment of said debt or 26 debts, granted, bargained, sold, and mortgaged, and by these presents do grant, bargain, sell, and mortgage unto the said mortgagee, its successors and assigns, all that certain personal property described as follows: to wit, also One Buffalo Pitts 22 H. P. Special Traction Engine, Complete, shop number 6659, with main drive belt, trucks, hose, and all fixtures and appendages with or belonging to the same, which said above de- 27 scribed property at the date these presents, is in possession of said party of the first part, and is now situated in the Town of Roswell, County of Chaves, Territory of New Mexico, and is free of all liens, conveyances, incumbrances, and levies,

28 and so stated this day, all the said property being now in the possession of said Mortgagor, in the County of Chaves and State aforesaid, and free from all incumbrances. To have and to hold all and singular, the personal property aforesaid, forever, as security for the payment of the notes and obligations hereinafter described. Provided, always, and these presents are upon this express condition, that if the said Mortgagor shall pay
 29 or cause to be paid unto the Mortgagee, its successors or assigns, the sum of sixteen hundred no/100 dollars according to the conditions of seven certain promissory notes payable to the Buffalo Pitts Company, viz:

One note dated May, 1905, due June 20, 1905, for \$250.00 and interest.

One note dated May, 1905, due July 20, 1905,
 30 for \$250.00 and interest.

One note dated May, 1905, due August 20, 1905, for \$250.00 and interest.

One note dated May, 1905, due September 20, 1905, for \$250.00 and interest.

One note dated May, 1905, due October 20, 1905, for \$250.00 and interest.

One note dated May, 1905, due November 20,
 31 1905, for \$250.00 and interest.

One note dated May, 1905, due December 20, 1905, for \$100.00 and interest.

And any and all renewals and extensions thereof, in which is stipulated that if not paid when

due, then it shall become due and payable at Hous- 32
 ton, Harris County, Texas, and which is the ob-
 ject of this Mortgage to secure, and shall perform
 and fulfill the conditions herein contained, then
 these presents to be void and of no effect, but if
 default shall be made in the payment of said sum
 of money or the interest thereon, at the time the
 said notes shall become due, or if any attempt
 shall be made to dispose of or injure said prop-
 erty or to remove said property from said County 33
 of Claives, or any part thereof, by said Mortgagor
 or any other person, or if said Mortgagor does
 not take proper care of said property, or if said
 Mortgagee shall at any time deem itself unsafe
 or insecure, then the whole amount of said money
 in said notes mentioned which shall not have been
 paid, shall be considered immediately due and
 payable, and the said party of the second part
 its successors or assigns, shall have right and be 34
 entitled to declare all of said notes due and pay-
 able, anything in said notes to the contrary not
 withstanding, and then, thereupon and thereafter,
 it shall be lawful, and the said Mortgagor hereby
 authorizes said Mortgagee, its successors or as-
 signs, or its or their authorized agent, to take said
 property and enter on the premises wherever the
 same be found, to take and remove the same, and
 hold or sell and dispose of the same and all equity 35
 of redemption at public auction, with notice as
 provided by law, and on such terms and at such
 places as said Mortgagee or its agent may see
 fit, and said Mortgagee may become the purchaser
 of said property at sale, retaining such amount

- 36 as shall pay the aforesaid notes and interest thereon, and an attorney fee of fifteen dollars and all charges, costs expenses of pursuing, searching for, taking, removing, storing, and selling said described property, returning the surplus money, if any there may be, to the said Mortgagor, or his assigns, and the said Mortgagor hereby waives demand and personal notice of the time and place of sale. And it is further provided and agreed,
- 37 that if the proceeds of said sale after all expenses as above specified shall have been fully paid, do not amount to a sufficient sum necessary to cancel the whole debt and interest thereon, then and in that case the said Buffalo Pitts Company are hereby authorized and empowered to endorse amount on any or all notes representing said debt, as they in their judgment may elect to do and the said parties of the first part hereby waive
- 38 any appraisement and any and all relief from any valuation or appraisement laws.

IN WITNESS WHEREOF, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

THE TAYLOR-MOORE CONSTRUCTION Co. (Seal)

By J. WILL GILLIAM, (Seal)

39 TERRITORY OF NEW MEXICO, } ss:
COUNTY OF CHAVES.

Before me the undersigned authority, a notary public within and for the County and State aforesaid, duly commissioned and qualified, personally

appeared J. Will Gilliam, Secretary-Treasurer of 40
the Taylor-Moore Construction Company, personally known to me to be the same person whose name is subscribed to the foregoing and within instrument of writing and acknowledged to me that he executed the same freely and voluntarily for the purposes and consideration therein expressed and in the capacity therein stated.

Given under my hand and seal of office, this 41
20th day of May, A. D., 1905.

(Name)	SUDVE J. SMITH.
(Title of office)	<i>Notary Public,</i>
(Notarial Seal)	Chaves County, N. M.

Filed for record, May 22nd, 1905, at 9:30 A. M.,
F. P. Gayle, Recorder, by R. F. Ballard, Deputy.

TERRITORY OF NEW MEXICO, } ss: 42
COUNTY OF CHAVES.

I, F. P. Gayle, Probate Clerk, and ex-officio Recorder, in and for the County of Chaves and Territory aforesaid, do hereby certify that the annexed copy of chattel mortgage recorded in chattel mortgage record J, at pages et seq., records of Chaves County, N. M., is true and literal exemplification from the record in this office. Wit- 43
ness my hand and seal of office on this the 23rd day of June, 1905.

F. P. GAYLE.

Probate Clerk and Ex-officio Recorder,

By R. F. BALLARD, *Deputy.*

44 UNITED STATES CIRCUIT COURT,
WESTERN DISTRICT OF NEW YORK.

BUFFALO PITTS COMPANY,

Plaintiff,

AGAINST

THE UNITED STATES OF AMERICA,

Defendant.

Answer.

45

The United States of America, by John Lord O'Brien, United States Attorney in and for the Western District of New York, upon its information and belief, answers the petition of the plaintiff herein as follows:

1. Admits that the Buffalo Pitts Company, the plaintiff herein, is organized and has its place of business as in said petition set forth; that the Taylor Moore Construction Company had a certain contract with the United States of America, the defendant herein, through its Department of Interior, for certain reclamation work in the Territory of New Mexico; that on or about June 7th, 1905, the United States of America suspended the Taylor Moore Construction Company from Work on and under such contract and took possession of all supplies, materials and equipments of said Company then on said work, including the so-called Buffalo Pitts' engine mentioned in said petition, pursuant to the provisions of the contract aforesaid and thereupon and thereafter completed

46

47

the work thereunder by and with the use, aid and 48
assistance of the said supplies, materials and
equipments, including the said engine.

2. Denies that it has any knowledge or infor-
mation sufficient to form a belief as to any mat-
ters or things in said petition alleged or con-
tained not hereinbefore specifically admitted.

Wherefore, the said defendant demands judg-
ment dismissing the petition of the plaintiff here- 49
in, with costs.

Dated Buffalo, N. Y., October 26th, 1910.

THE UNITED STATES OF AMERICA,

Defendant and Respondent,

By JOHN LORD O'BRIAN,

United States Attorney in and 50
for the Western District of

New York,

405 Federal Building,

Buffalo, N. Y.

WESTERN DISTRICT OF NEW YORK, }
STATE OF NEW YORK, } ss.:
County of Erie.

51

JOHN LORD O'BRIAN, being duly sworn, deposes
and says: That he is the Attorney of the United
States in and for the Western District of New
York; that he has read the foregoing answer and
knows the contents thereof; that the same is true

52 of his own knowledge, except as to the matters therein stated to be upon information and belief, and that as to those matters he believes it to be true.

That the reason this verification is made by deponent, and not by the United States of America, is that the said United States of America is a sovereign corporation.

53

JOHN LORD O'BRIAN,

Sworn to before me this
26th day of October, 1910.

LEROY N. KILMAN,

Notary Public

in and for Erie County, N. Y.

54

UNITED STATES CIRCUIT COURT,
WESTERN DISTRICT OF NEW YORK.

BUFFALO PITES COMPANY,

Plaintiff,

AGAINST

55 UNITED STATES OF AMERICA,

Defendant.

Decision and Finding

The issues of fact coming on to be tried by the Court at a regularly appointed term held by the

undersigned, without a jury and having been tried 56
on the 9th day of February, 1911, and the alle-
gations and evidence of the parties having been
heard; now, after hearing White & Babcock for
the plaintiff and William Palmer, Esq., for the
defendant, and due deliberation having been had,
I decide and find as follows:

I. That the plaintiff, Buffalo Pitts Company,
is and was at all the times mentioned in the peti- 57
tion and complaint a corporation organized under
the laws of the State of New York, having its
principal place of business at the City of Buf-
falo, N. Y., and being engaged in the manufacture
and sale of agricultural implements and other ma-
chinery, including traction engines and their ap-
purtenances.

II. That on or about May 20, 1905, the plain- 58
tiff sold and delivered to the Taylor-Moore Con-
struction Co. at Roswell, New Mexico, where it
had its principal place of business, a Buffalo Pitts
22 horse-power traction engine, shop No. 6659,
with the appurtenances, for the price of \$1,820
and then and there took back a chattel mortgage
from said Taylor-Moore Construction Co. to
secure the payment of \$1,600 of the purchase
price, receiving in addition \$145.40 in cash, and 59
the said Construction Company paying freight
charges for the transportation of said engine
amounting to the balance.

III. That said chattel mortgage conveyed said
engine and property to the plaintiff upon condi-

60 tion that if the said mortgagor should pay the sum of \$1,600 according to the conditions of seven certain promissory notes payable to the Buffalo Pitts Company, the first of which became due June 20, 1905, and should perform and fulfill the conditions therein contained, then the said indenture should be void and of no effect, but if default should be made in payment as aforesaid, or if
 61 injure said property or to remove said property from said County of Chaves or any part thereof, by said mortgagor or any other person, or if said mortgagor should not take proper care of said property, or if said mortgagee should at any time deem itself unsafe or insecure, then the whole amount unpaid should be considered immediately due and payable, and then, thereupon and thereafter it should be lawful for the said mortgagee to take said property and enter on the premises wherever the same be found, to take and remove the same and hold or sell and dispose of the same and all equity of redemption at public auction with notice as provided by law. That said mortgage was duly filed for record in the office of the Recorder of said County of Chaves on May 22, 1905, at 9:30 A. M., and no part of the money thereby secured was ever paid to said mortgagee which has ever since been the owner and
 62
 63 holder of said mortgage.

IV. That thereupon the said engine was put to work by said Taylor-Moore Construction Co. upon the so-called Hondo Project, being part of

the reclamation service undertaken by the Depart- 64
ment of the Interior of the United States which
work was being prosecuted under a contract be-
tween said defendant and said Taylor-Moore Con-
struction Co., the said engine being located at or
near Roswell, New Mexico.

V. That the said Construction Company hav-
ing made default in the performance of its said
contract on or about the 7th day in June, 1905, 65
was suspended from work thereunder, and then
assigned to the United States all its interest in
said contract, and the United States on that day
took possession of all material, supplies and equip-
ment belonging to said Construction Company,
including the said engine and appurtenances, pur-
suant to and under the provisions of said contract
with the United States.

VI. That on or about the 16th day of June, 66
1905, at Roswell, New Mexico, the plaintiff by its
agent made a demand upon the defendant through
Wendell M. Reed, District Engineer of the Re-
clamation Service under the Department of the
Interior, for the possession of said engine and
appurtenances, which the defendant then and
there refused, and thereafter the defendant re-
tained and used said property in the work under
said contract until June 21, 1906. 67

VIII. That said Wendell M. Reed was during
said period, and before and after the same, the
local representative of the Government in charge
of the work under said contract, at and near Ros-

68 well, New Mexico, and as such took possession of said engine and appurtenances for the United States, and thereafter the defendant by the Director of the U. S. Geological Survey to whom the Secretary of the Interior referred said matter, and by the Chief Engineer and Assistant Chief Engineer of the Reclamation Service under the direction of said Department, ratified and adopted the acts of said Wendell M. Reed, District Engineer, in respect to the possession of
69 said engine and appurtenances.

VIII. That the value of said engine and appurtenances at the time of said demand and refusal was the sum of \$1,674.60 and the value thereof when the defendant got through using the same as aforesaid was reduced to \$500. That the engine was then in bad condition, stripped of many
70 of its parts and greatly worn.

IX. That no part of the said mortgage has ever been paid to the mortgagee and that the mortgagor has never made any claim to the property since the suspension and assignment of said contract to the defendant as aforesaid.

X. That during the use and occupation of the said engine and appurtenances by the defendant,
71 the plaintiff, to wit: on or about June 16, 1905, and also on or about September 30, 1905, notified the defendant of the execution and filing of said mortgage as aforesaid and that the plaintiff claimed the said property under the title thereby vested in it and claimed the right of possession

because of the default by the mortgagor in the 72 conditions thereof, and that the defendant at all said times well knew of the existence and filing of said chattel mortgage and did not at any time dispute the validity thereof, and on September 30, 1905, represented to the plaintiff that the defendant was using and would continue to use said engine in said work and that any legal proceedings to recover the possession thereof would be resisted and defeated by the defendant, and further represented to the plaintiff that if said property were left in the defendant's possession its attorney would recommend payment by the defendant therefor. 73

XI. That the plaintiff relied upon the fact that its title to the property under the chattel mortgage was not disputed by the defendant and upon the representations made to it as aforesaid and 74 consented to defendant's retaining possession of said property in expectation of receiving due compensation therefor.

XII. That the defendant after the completion of the work aforesaid surrendered the said property to the plaintiff, its fair and reasonable value at that time being \$500 as aforesaid.

75

CONCLUSIONS OF LAW.

I. That the plaintiff was the lawful owner of the said property on June 16, 1905, when it demanded the possession thereof from the defend-

76 ant and was then entitled to the possession thereof as against the said mortgagor, the Taylor-Moore Construction Co., and its assigns.

II. That after the aforesaid refusal by the defendant of such demand the defendant was liable to the plaintiff under an implied contract to pay proper compensation for the use and occupation of said property.

77

III. That the defendant is estopped by the conduct of its officers and representatives from denying that the said engine and its appurtenances were the property of the plaintiff.

IV. That the plaintiff is entitled to recover against the defendant the sum of \$1,174.60, with interest thereon from June 21, 1906, together with
78 the costs and disbursements of this action.

Dated Buffalo, N. Y., February 27, 1911.

JOHN R. HAZEL,
U. S. Judge.

UNITED STATES CIRCUIT COURT,
WESTERN DISTRICT OF NEW YORK.

80

BUFFALO PITTS COMPANY,

Plaintiff,

AGAINST

UNITED STATES OF AMERICA,

Defendant.

Exceptions to
Findings.

81

The above entitled action having been tried before the Honorable John R. Hazel, United States District Judge in and for the Western District of New York, on February 9, 1911, and the said Judge having thereafter and on February 27, 1911, made, signed and filed his decision and findings in writing, the United States of America, the defendant above named, hereby makes and files the following exceptions to the decision and findings aforesaid:

1. The said defendant excepts to the finding contained in said decision and numbered "VI," in the words and figures following:

"That on or about the 16th day of June, 1905, at Roswell, New Mexico, the plaintiff by its agents made a demand upon the defendant through Wendell M. Reed, District Engineer of the Reclamation Service under the Department of the Interior, for the possession of said engine and appurtenances, which the defendant then and there refused.

82

84 and thereafter the defendant retained and used said property in the work under said contract until June 21, 1906”;

and to each and every part thereof.

2. The said defendant excepts to the finding contained in said decision and numbered “VII,” in the words and figures following:

85 “That said Wendell M. Reed was, during said period, and before and after the same, the local representative of the Government in charge of the work under said contract, at and near Roswell, New Mexico, and as such took possession of said engine and appurtenances for the United States, and thereafter the defendant by the Director of the U. S. Geological Survey to whom the Secretary of

86 the Interior referred said matter, and by the Chief Engineer and Assistant Chief Engineer of the Reclamation Service under the direction of said Department, ratified and adopted the acts of said Wendell M. Reed, District Engineer, in respect to the possession of said engine and appurtenances”;

and to each and every part thereof.

87 3. The said defendant excepts to the finding contained in said decision and numbered “X,” in the words and figures following:

“That during the use and occupation of the said engine and appurtenances by the defend-

ant, the plaintiff, to wit: on or about June 88
 16, 1905, and also on or about September 30,
 1905, notified the defendant of the execution
 and filing of said mortgage as aforesaid and
 that the plaintiff claimed the said property
 under the title thereby vested in it and
 claimed the right of possession because of the
 default by the mortgagor in the conditions
 thereof, and that the defendant at all said
 times well knew of the existence and filing 89
 of said chattel mortgage and did not at any
 time dispute the validity thereof, and on Sep-
 tember 30, 1905, represented to the plaintiff
 that the defendant was using and would con-
 tinue to use said engine in said work and that
 any legal proceedings to recover the posses-
 sion thereof would be resisted and defeated
 by the defendant, and further represented to
 the plaintiff that if said property were left in 90
 the defendant's possession its attorney would
 recommend payment by the defendant there-
 for";

and to each and every part thereof.

4. The said defendant excepts to the finding
 contained in said decision and numbered "XI,"
 in the words and figures following:

91

"That the plaintiff relied upon the fact
 that its title to the property under the chattel
 mortgage was not disputed by the defendant
 and upon the representations made to it as
 aforesaid and consented to defendant's re-

- 92 taining possession of said property in expectation of receiving due compensation therefor”;

and to each and every part thereof.

The said defendant also excepts to the conclusions of law contained in said decision and findings as follows:

- 93 1. The said defendant excepts to the conclusion of law contained in said decision and numbered “I,” in the words and figures following:

“That the plaintiff was the lawful owner of the said property on June 16, 1905, when it demanded the possession thereof from the defendant and was then entitled to the possession thereof as against the said mortgagor, the Taylor-Moore Construction Co.,
94 and its assigns”;

and to each and every part thereof.

2. The said defendant excepts to the conclusion of law contained in said decision and numbered “II,” in the words and figures following:

95 “That after the aforesaid refusal by the defendant of such demand the defendant was liable to the plaintiff under an implied contract to pay proper compensation for the use and occupation of said property”;

and to each and every part thereof.

- 92 taining possession of said property in expectation of receiving due compensation therefor”;

and to each and every part thereof.

The said defendant also excepts to the conclusions of law contained in said decision and findings as follows:

- 93 1. The said defendant excepts to the conclusion of law contained in said decision and numbered “I,” in the words and figures following:

“That the plaintiff was the lawful owner of the said property on June 16, 1905, when it demanded the possession thereof from the defendant and was then entitled to the possession thereof as against the said mortgagor, the Taylor-Moore Construction Co., and its assigns”;

- 94

and to each and every part thereof.

2. The said defendant excepts to the conclusion of law contained in said decision and numbered “II,” in the words and figures following:

- 95 “That after the aforesaid refusal by the defendant of such demand the defendant was liable to the plaintiff under an implied contract to pay proper compensation for the use and occupation of said property”;

and to each and every part thereof.

INDEX TO TELEGRAMS

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3. The said defendant excepts to the conclusion of law contained in said decision and numbered "III," in the words and figures following:

"That the defendant is estopped by the conduct of its officers and representatives from denying that the said engine and its appurtenances were the property of the plaintiff";

and to each and every part thereof.

96

4. The said defendant excepts to the conclusion of law contained in said decision and numbered "IV," in the words and figures following:

"That the plaintiff is entitled to recover against the defendant the sum of \$1,174.60, with interest thereon from June 21, 1906, together with the costs and disbursements of this action";

and to each and every part thereof.

Dated Buffalo, N. Y., April 25, 1911.

JOHN LORD O'BRIAN,

99

United States Attorney in

and for the Western District

of New York.

100 UNITED STATES CIRCUIT COURT,
WESTERN DISTRICT OF NEW YORK.

BUFFALO PITTS COMPANY,

Plaintiff,

AGAINST

UNITED STATES OF AMERICA,

Defendant.

Judgment.

101

The issues in this action having been regularly brought on for trial before Hon. John R. Hazel, District Judge, without a jury, at a Trial Term of this Court, held on the 9th day of February, 1911, at the Federal Building in the City of Buffalo, in the Western District of the State of New York, and the respective parties appearing by
102 their attorneys, and the court having heard the allegations and proofs of the parties, and after due deliberation having duly made and filed its decision of the 28th day of February, 1911, containing a statement of the facts found and the conclusions of law thereon and directing judgment as hereinafter stated, and the plaintiff's costs having been duly adjusted at fifty-four and no/100 dollars,

103

Now, on motion of WHITE & BARCOCK, attorneys for the plaintiff, it is adjudged that the plaintiff recover against the defendant the sum of eleven hundred seventy-four and 60/100 dollars, with interest thereon from June 21, 1906, amounting to

fifteen hundred four and 85/100 dollars damages, 104
together with fifty-four and no/100 dollars
(\$54.00) costs, in all the sum of fifteen hundred
fifty-eight and 85/100 dollars (\$1,558.85). Judg-
ment filed, docketed and entered this 28th day of
February, 1911, at 4.05 P. M.

(Signed)

HARRIS S. WILLIAMS,

Clerk.

105

UNITED STATES CIRCUIT COURT,
WESTERN DISTRICT OF NEW YORK.

BUFFALO PITTS COMPANY,

Plaintiff,

AGAINST

UNITED STATES OF AMERICA,

Defendant.

Bill of Exceptions.

106

BE IT REMEMBERED that on the 9th day of Feb-
ruary, 1911, said day being one of the days of the
November, 1910 term of said Court, before the
Honorable John R. Hazel, United States District
Judge, in and for the Western District of New 107
York, the above entitled action was moved for
trial, without a jury, by the plaintiff therein ap-
pearing by Edward Payson White, Esq., one of
its attorneys, and the defendant appearing by
William Paimer, Assistant United States Attor-

108 ney, and that thereupon the following proceedings were had:

Mr. White on behalf of the plaintiff made an opening statement of the claim and case of the plaintiff, and the plaintiff to maintain the issues on its part introduced the following evidence, viz:

The plaintiff offered in evidence certified copy of the chattel mortgage made by the Taylor-Moore
109 Construction Company to the Buffalo Pitts Company, which was received in evidence, marked Exhibit 1, and is as follows:

CHATTEL MORTGAGE.

TAYLOR-MOORE CONSTRUCTION COMPANY TO BUFFALO PITTS COMPANY.

110 This indenture made and entered into this — day of May in the year One Thousand Nine Hundred and Five, by the Taylor-Moore Construction Company of the Town of Roswell, County of Chaves, Territory of New Mexico, Mortgagor, to Buffalo Pitts Company, a body corporate under the laws of the State of New York, Mortgagee, WITNESSETH, that the said Mortgagor being
111 justly indebted to the said Mortgagee in the sum of sixteen hundred no-100 dollars, which sum is hereby confessed and acknowledged to be due and payable by the Mortgagor to the Mortgagee, over and above all offsets and counterclaims, have for the purpose of securing the payment of said debt or debts, granted, bargained, sold and mortgaged,

and by these presents do grant, bargain, sell and 112
 mortgage unto the said mortgagee, its successors
 and assigns, all that certain personal property
 described as follows: to wit, also one Buffalo Pitts
 22 H. P. Special Traction Engine, complete, shop
 number 6659, with main drive belt, trucks, hose
 and all fixtures and appendages with or belonging
 to the same, which said above described property
 at the date these presents, is in possession of said
 party of the first part, and is now situated in the 113
 Town of Roswell, County of Chaves, Territory of
 New Mexico, and is free of all liens, conveyances,
 incumbrances and levies, and so stated this day,
 all the said property being now in the possession
 of said Mortgagor, in the County of Chaves and
 State aforesaid, and free from all incumbrances.
 To have and to hold all and singular, the personal
 property aforesaid, forever, as security for the
 payment of the notes and obligations hereinafter 114
 described. Provided, always, and these presents
 are upon this express condition, that if the said
 Mortgagor shall pay or cause to be paid unto the
 Mortgagee its successors or assigns the sum of
 sixteen hundred no-100 dollars, according to the
 conditions of seven certain promissory notes pay-
 able to the Buffalo Pitts Company, viz:

One note dated May, 1905, due June 20, 1905, 115
 for \$250 and interest.

One note dated May, 1905, due July 20, 1905,
 for \$250 and interest.

One note dated May, 1905, due August 20, 1905,
 for \$250 and interest.

116 One note dated May, 1905, due September 20, 1905, for \$250 and interest.

One note dated May, 1905, due October 20, 1905, for \$250 and interest.

One note dated May, 1905, due November 20, 1905, for \$250 and interest.

One note dated May, 1905, due December 20, 1905, for \$100 and interest and any and all re-
117 newals and extensions thereof, in which is stipu-
lated that if not paid when due, then it shall be-
come due and payable at Houston, Harris County,
Texas, and which is the object of this mortgage
to secure, and shall perform and fulfill the condi-
tions herein contained, then these presents to be
void and of no effect, but if default shall be made
in the payment of said sum of money or the in-
terest thereon, at the time the said notes shall
118 become due, or if any attempt shall be made to
dispose of or injure said property or to remove
said property from said County of Chaves, or
any part thereof, by said Mortgagor or any other
person, or if said Mortgagor does not take proper
care of said property, or if said Mortgagee shall
at any time deem itself unsafe or insecure, then
the whole amount of said money in said notes
mentioned which shall not have been paid, shall
119 be considered immediately due and payable, and
the said party of the second part, its successors
or assigns, shall have the right and be entitled
to declare all of said notes due and payable, any-
thing in said notes to the contrary notwithstanding,
and then, thereupon and thereafter, it shall

be lawful, and the said Mortgagor hereby author- 120
 izes said Mortgagee, its successors or assigns, or
 its or their authorized agent, to take said property
 and enter on the premises wherever the same be
 found, to take and remove the same, and hold or
 sell and dispose of the same and all equity of re-
 demption at public auction, with notice as provided
 by law, and on such terms and at such places as
 said Mortgagee or its agents may see fit, and said
 Mortgagee may become the purchaser of said prop- 121
 erty at sale, retaining such amount as shall pay
 the aforesaid notes and interest thereon, and an
 attorney fee of fifteen dollars, and all charges,
 costs, expenses of pursuing, searching for, taking,
 removing, keeping, storing and selling said de-
 scribed property, returning the surplus money,
 if any there may be, to the said Mortgagor, or
 his assigns, and the said Mortgagor hereby waives
 demand and personal notice of the time and place 122
 of sale. And it is further provided and agreed,
 that if the proceeds of said sale after all expenses
 as above specified shall have been fully paid, do
 not amount to a sufficient sum necessary to cancel
 the whole debt and interest thereon, then and in
 that case the said Buffalo Pitts Company are
 hereby authorized and empowered to endorse net
 amount on any or all notes representing said
 debt, as they in their judgment may elect to do 123
 and the said parties of the first part hereby waive
 any appraisement and any and all relief from
 any valuation or appraisement laws.

124 IN WITNESS WHEREOF, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

THE TAYLOR-MOORE CONSTRUCTION CO. (Seal)

By J. WILL GILLIAM,

Secy. & Treas. (Seal)

TERRITORY OF NEW MEXICO, } ss.
125 COUNTY OF CHAVES.

Before me the undersigned authority, a notary public within and for the county and state aforesaid, duly commissioned and qualified, personally appeared J. Will Gilliam, Secretary-Treasurer of the Taylor-Moore Construction Company, personally known to me to be the same person whose name is subscribed to the foregoing and within
126 instrument of writing and acknowledged to me that he executed the same freely and voluntarily for the purposes and consideration therein expressed and in the capacity therein stated.

Given under my hand and seal of office, this 20th day of May, A. D., 1905.

Name, SUDYE J. SMITH,

(Title of office)

Notary Public,

(Notarial Seal)

Chaves County, N. M.

127 Filed for record May 22, 1905, at 9.30 A. M.

F. P. GAYLE,

Recorder.

By R. F. BALLARD,

Dep.

TERRITORY OF MEXICO, } ss.
 COUNTY OF CHAVES.

I, R. F. BALLARD, Probate Clerk, and ex-officio Recorder, in and for the County of Chaves and territory aforesaid, do hereby certify that the annexed copy of chattel mortgage recorded in chattel mortgage record J. at pages et seq. records of Chaves Co., N. M., is true and literal exemplification from the record in this office. Witness my hand and seal of office on this the 28th day of November, 1910. 129

R. F. BALLARD.

Probate Clerk and Ex-officio Recorder.

The plaintiff offered and read in evidence the following questions and answers from the deposition of Wendell M. Reed taken in the above entitled action: 130

Q. Were you in 1905 and 1906 employed as District Engineer of the Reclamation Service of the United States in the Territory of New Mexico?

A. I was.

Q. Did you then and there have charge of the work prosecuted by said Government known as the Hondo Project? 131

A. I did.

Q. Did said Government on or about June 5th, 1905, suspend the operations of the Taylor-Moore Construction Company upon said work?

A. It did.

George Hockenhill — direct.

132

Q. Did you on or about June 5th, 1905, take possession for said Government of a 22 H. P. Buffalo Pitts traction engine and its appurtenances which were previously in the possession of the Taylor-Moore Construction Company?

133

A. About the date mentioned on behalf of the Government I took possession of all machinery and equipment then in the possession of the Taylor-Moore Construction Company located on the property of the United States in the vicinity of the Hondo Project, including a Buffalo Pitts engine of about 22 H. P.

GEORGE HOCKENHILL, sworn as a witness for
134 the plaintiff, testified as follows:

“I live at Gainsville, Texas. In 1905 I resided there but was travelling for the Buffalo Pitts Company. I was travelling salesman and collector. The Texas office of the company was at Dallas. In June, 1905, I was instructed to go to Roswell, New Mexico, to see what could be done about collecting the claim of the Buffalo Pitts Company
135 against the Taylor-Moore Construction Company. We had been informed that they had failed financially. I arrived at Roswell, June 15, 1905. The next day I called at the office of W. M. Reed, who was in charge of the Government work there, and had a talk with him about our claim. At that time they had possession of the engine and Mr.

Reed gave me to understand that they intended to keep it. I had a copy of our chattel mortgage with me. Mr. Reed understood about it. He knew it was on record in that county. In my conversation with Mr. Reed about our chattel mortgage against the Taylor-Moore Construction Company, I think he said he knew about the chattel mortgage and that it was recorded. We talked about it a number of times. He read to me from 137 the contract between the Government and the Taylor-Moore Construction Company regarding the right of the Government to take possession of all machinery on the Hondo Project and continue the work or get someone else to do it. They were trying at that time to get someone else to take up the contract. I said to him that I had been sent out there to take possession of the engine if I could not get pay for it. I said to him, "Mr. Reed, 138 what would you do if I should take legal proceedings to get possession of the engine?" Mr. Reed said, "I would be bound to exert all the power of the Government to retain it." I said I had made up my mind it was foolish for us to commence a litigation at that time at least. He said that it would only be a few days until the Government would do something about it, either surrender the engine or pay our claim. And never questioned 139 the right that we had to our pay, of deferred payment. At that time he said this, that he thought it would only be a few days until they would do something about it; that they had no idea of giving it up. He made no positive promise but he

George Hockenbuhl — direct.

- 140 thought it would only be a few days until the Government would instruct him to settle with us and retain the engine. They seemed to think it was necessary on the works and did not care to give it up. They had to carry on the work they were doing at that time, or get somebody else to take it up, take up the contract. He said that it would be decided within a few days whether the Govern-
- 141 ment would continue the work or get someone else to take it up; that if they could not get someone else to take it up, that they would finish the job themselves. I made a report to the plaintiff on my journey to Roswell and the result of my interview there. I made a report every night to the people I was working for, what I had been doing. I did not after that time receive any word from Mr. Reed or any other officer of the Govern-
- 142 ment as to any decision on their part. In September, 1905, I was instructed to go out there again. I arrived there the 20th or 21st of September and found conditions just about as I had left them. Several days after I arrived Mr. Llewellyn, United States Attorney, came. From Gainesville, Texas, to Roswell, N. M., it is about \$16 or \$18 railroad fare, 3 cents a mile. About five or six hundred miles. It is about six hundred
- 143 miles, I guess, or possibly a little more. On this second trip I saw Wendell M. Reed, the District Engineer. I saw him nearly every day. I was up in his office. I saw him several times. We talked the matter over every time I would meet him. Mr. Reed could do nothing. He said the

matter was in just the same shape as when I had
 been there before in June. He still thought the
 Government would pay for the engine. I finally
 decided to go back to Dallas or take some legal
 steps to do something about it and I consulted
 with some attorneys there. They told me the
 same thing that Mr. Reed had. They said that
 if we undertook to take the engine we would have
 to give a bond for twice the amount of our claim 145
 and the Government would turn around and take
 it away from us again and go ahead. We would
 not be in any better condition at all than we were
 at the present time. Mr. Reed told me this and
 the attorneys I consulted confirmed it. It was
 Richardson, Reed and Harvey, I think the name
 of the law firm. They said the same thing, that
 that would be the condition we would get into if
 we tried to take the engine away from the Govern- 146
 ment. I talked with Mr. Reed about how we were
 going to get our pay eventually; that was what
 I was after; trying to get the thing settled, try-
 ing to get the money for the Buffalo Pitts people.
 We did not care for the engine; we didn't want
 the engine really, but we, of course, as a last re-
 sort, consented to take it under the terms of the
 mortgage. The lawyers advised me that I was
 taking exactly the right course in doing what I 147
 did, not to try to pile up more expense because it
 would be useless. That was their decision, and
 just make a lot of expense and be still in the same
 position that we were. The Government at that
 time was prosecuting the work on the Hondo Pro-
 ject. The engine was being used on the work.

George Hockenull — direct.

148

Q. What did you say in your interviews with Mr. Reed in September about your wanting possession of the engine for the plaintiff?

A. Well, just about as I have stated. He understood well what I was there for.

Q. Well, but what did you tell him? Did you tell him that you wanted the engine?

A. Yes, sir.

149

Q. What did he say?

A. I told him we were tired of waiting for the Government to do anything about it. We wanted possession of it, to get what we could out of it; that they were wearing it out and doing nothing.

Q. What did he say to that?

A. He simply said as he had before, he wouldn't give it up.

150

Q. Did he refer to any other officer of the United States Government?

A. I told him that I thought I would leave. He asked me then to wait a few days, a day or two, I have forgotten just how many days. He said Judge Llewellyn would be there soon in two or three days; asked me to wait for him and I did. Judge Llewellyn was the United States District Attorney of that district—Territory of New Mexico.

151

I met them together up in Mr. Reed's office.

Q. What occurred there?

Objected to by the defendant upon the ground that the United States Attorney had no authority to bind the United States to any contract or to

enter into any contractual relations in his representative capacity.

Objection overruled and exception to the defendant.

The Court: I think I ought to state in overruling the objection that I do not mean to bind myself to ruling now as a matter of law that the conversation of the United States Attorney was 153 binding upon the Government.

A. I asked Mr. Llewellyn what he thought would be the outcome of the thing; whether he thought there was any prospect of the Government to pay for the engine or not, and he and Mr. Reed both said that they thought our claim was just and would like to see us get our money; and then the Judge (Llewellyn) suggested that he would write a letter to the Department that day 154 suggesting a settlement, and later on the same day read me a copy of his letter.

Plaintiff offered and read in evidence the following extract from the letter of W. H. H. Llewellyn to the Attorney General, dated Roswell, New Mexico, September 30, 1905:

“In this connection I desire to call your 155 attention to the fact that the Buffalo Pitts Mfg. Co. furnished the Taylor-Moore Construction Co. with a traction engine of the value of \$1,600, giving said Buffalo Pitts Mfg. Co. a chattel mortgage on same. The reclamation engineers are using this engine. The

George Hockenull — direct.

156

Buffalo Pitts Company desire either to have the engine or make some arrangement whereby they may be paid for this sale, and the question is in the event of their attempting to replevy same and take it from the possession of the engineers, whether I should resist it or not. I take it that there could be a redelivery to the engineers and under Section

157

1001 R. S. would not be required to give a bond, and could probably keep possession of the engine for some time and thus enable the engineers to complete the reservoir in question. But would not this subject the Government to a suit which would result eventually in the Government having to pay for the engine. I will thank you to advise me what in your opinion would be the correct

158

position for me to take on this question.

Respectfully,

W. H. H. LLEWELLYN,

United States Attorney.

Post Office Address,

Las Cruces, N. M."

159

The later part of this letter, which has been read, was the part which Mr. Llewellyn read to me. I do not think he read me the first part, at any rate I do not remember it. I never received any communication from Judge Llewellyn or Engineer Reed as to the decision of the Government in the

matter of this engine. I waited several days for Mr. Reed to get a reply or get some word from Llewellyn, and he never got it. I left there in October some time. I made reports to the Buffalo Pitts Company of the interviews between me and Mr. Reed and Judge Llewellyn. I mailed four letters to the Buffalo Pitts Company at Dallas, Texas, dated September 28, 1905, September 29, 1905, September 30, 1905, and a second letter dated 161 September 30, 1905.

Cross-examination:

I didn't know Mr. Reed before my first visit to Roswell. I didn't go there to see him. I did not go there to see the Construction Company; they were gone; they were out of the place, out of the country. They had some other project. I didn't know that before I went to Roswell. My 162 errand was to see them, but when I got there I found they were gone. I found Mr. Reed in possession of the engine. He was trying to get someone to take up the work. He didn't know what would happen when I first talked with him. He said the Government had taken possession of everything on the work belonging to the contractor and that it would be his duty to use all the power of the Government to retain possession. 163 My second visit was about three months later. The talk with Mr. Reed at that time was substantially the same as before. I never instituted any proceedings to recover possession of the engine. I have stated all that I can remember of my conversations with Mr. Reed and Mr. Llewellyn.

164

By the Court:

Q. Did you at any time say to Mr. Reed that you would institute proceedings to recover possession of the property?

A. I did; and asked him what he would do in case I did that. That was the time he said—

165

Q. What did he say, if anything, about knowing about the chattel mortgage?

166

A. Well, I don't know that I can give the exact words, but it was understood—we talked the matter over time and again about the chattel mortgage, and while we were talking about the chattel mortgage was the time that he drew out the agreement, or the substance of the agreement, with the Construction Company. Oh, no, he did not ask me not to commence proceedings, but he said—gave me to understand that that was his duty, and I think it was my evidence, that he showed me that it was his duty to hold the engine in spite of anything that I could do, that he would do that; it was his duty to the Government to do that.

To Mr. Palmer:

167

Well, I can't say that he did say at any time that he was acting under instructions from his department, but he certainly was acting under instructions, because he had sole charge of the whole thing. I don't know that he ever did state that he was—he was certainly boss of the ranch there. No one else had any say so.

John B. Olmsted — direct.

168

JOHN B. OLMSTED, sworn as a witness for the plaintiff, testified as follows:

In 1905 I resided in Buffalo and was the Secretary and attorney of the plaintiff. I am an attorney and counsellor at law of this state and have been such since 1879. It was part of my duty in 1905 to advise the Buffalo Pitts Company with reference to its claims and collections. In June, 1905, I learned that a traction engine which had been sold by us to the Taylor-Moore Construction Company had been taken possession of by the United States Government. The principal office of the company at that time was in Buffalo. We had a branch office in the City of Dallas, Texas. Our salesman in Texas reported to the Dallas office and the Dallas office reported in turn to the main office. That was the usual course. Concerning this traction engine that I have mentioned we had several reports from Dallas from time to time, letters, and most all of the letters I think at that time. Our manager was at that time in Dallas and had not made his visits to the home office. In June, 1905, I know that Mr. Hockenull was in the employ of the Buffalo Pitts Company in Texas. I couldn't testify exactly as to the first reports that were received in June, how they came, whether they came to me direct—a copy of Hockenull's reports, or whether they came in a letter from the manager at that time. We had, and have now, a practice at the Pitts Company of making what we call a slip of a claim. It contains briefs of all letters and information of any

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John B. Olmsted — direct.

kind that is either sent out from the home office, or is received by the home office, in regard to this particular claim. I have the slip of this claim here from which I refresh my recollection. I am of the impression that the first information in regard to the Government's having taken the engine, came in a communication from Mr. Batcheller, our manager there, written at Dallas, direct to us. We did receive information of this transaction at that time. On June 30th, 1905, the Pitts Company wrote a letter to the Secretary of the Interior; this is a copy of the letter.

Plaintiff offered and read in evidence the letter which is as follows:

“June 30th, 1905.

Dear Sir:

174

On the 20th of May, 1905, we sold to the Taylor-Moore Construction Company of Roswell, New Mexico, one of our Buffalo Pitts 22 horse power double cylinder special traction engines. Shop No. 6659, with main drive belt, trucks, hose and all fixtures and appurtenances with or belonging to the same. The purchase price of said machinery was \$1,600, represented by seven notes, each dated May 20th, 1905, due as follows:

175

June 20th, 1905.....	\$250.00
July 20th, 1905.....	250.00
Aug. 20th, 1905.....	250.00
Sept. 20th, 1905.....	250.00
Oct. 20th, 1905.....	250.00
Nov. 20th, 1905.....	250.00
Dec. 20th, 1905.....	100.00

Interest at 8% on each note from date. These notes were secured by a chattel mortgage bearing even date with the date of the notes, and covering the machinery above described. The machinery was delivered by us to the Taylor-Moore Construction Company at Roswell, New Mexico, and was put in operation on some work which they were doing there under a contract with the United States Government. We understand from reports received that the Government has taken over this work and has declared the contract of the Taylor-Moore Construction Company void. We understand further that the Government are continuing the work, and are making use of the engine in connection therewith; also that matters are in more or less mixed up condition concerning the contract, and that the officers of the Federal Government are now engaged in straightening matters out and determining what rights the various creditors of the Taylor-Moore Construction Company have in connection with the matter. 177 178

“We desire to state our position to you in order to have it properly understood. We understand that the engine above referred to is necessary to the work, and if the work is continued by the Government, will probably be used by it in the future. Under the terms of our mortgage, we suppose that we are entitled to the possession of our property, but we have of course no objections to leaving it 179

John B. Olmsted — direct.

180

on the work, provided reasonable assurance of ultimate settlement for it can be given.

181

“Will you kindly advise us what, if anything, more is necessary for us to do in the premises, and indicate, if possible, the action of the Government in connection with our claim above set forth. We have a certified copy of our chattel mortgage, and can submit it if it is necessary.

Yours truly,

BUFFALO PITTS COMPANY,

The Honorable Secretary of the Interior,
Washington, D. C.”

182

I have the reply to this letter, dated August 2, 1905.

Plaintiff offers and reads in evidence such reply, as follows:

“Subject: Engine furnished Taylor-Moore Co.,

Department of the Interior,
United States Geological Survey,
Washington, D. C., Aug. 2, '05.

183

Buffalo Pitts Company,
Buffalo, N. Y.

Gentlemen:—

Your letter of June 30, addressed to the Secretary of the Interior, has been referred to this office.

"You state that on June 20, you sold to the Taylor-Moore Construction Company a traction engine and delivered same to said company at Roswell, N. M., for use in prosecution of a contract with the United States; that the purchase price of said engine was \$1,600, represented by several notes secured by chattel mortgage. The work under this contract having been taken over by the United States, you desire to ascertain what action the United States will take in connection with your claim. 185

"The contract referred to is no doubt the contract between the Secretary of the Interior and the said company for the construction of certain work in connection with the Hondo Project. Under the terms of said contract, in case of default by the contractor the United States is entitled to the possession of the contractor's machinery delivered on the ground and if the engine referred to was delivered, the United States has taken possession of it under the terms of the said contract. 186

"The remedy of those furnishing labor or materials used by contractors in the prosecution of contracts with the United States, appears to be set forth in the act of Congress approved February 24, 1905 (33 Stat., 811). 187

Very respectfully,

H. C. RIZER,
Acting Director."

John B. Olmsted — direct.

188

On August 22nd, 1905, the plaintiff replied to the letter of the Department of the Interior.

Plaintiff offers and reads in evidence this letter which is as follows:

“August 22d, 1905.

A. P. D.

Engine furnished Taylor-Moore Co.

189

H. C. Rizer, Acting Director,
Department of the Interior,
U. S. Geological Survey,
Washington, D. C.

Dear Sir:—

190

We are in receipt of your letter of Aug. 2d, 1905, and reference to the Statute passed in February in connection with claims against the United States Government.

“We have made an examination of the statute. We have also received information from Roswell, New Mexico, where the work is being carried on, that the Government is using our engine, and that a bond filed by the Taylor-Moore Construction Company of \$24,000, and that the full indebtedness is about \$50,000.

191

“Our claim is somewhat different from the ordinary claim of supplies furnished. As we have already informed you, we have a chattel mortgage on the engine, and whereas we are perfectly willing that the Government should keep the engine and use it, upon assurance

John B. Olmsted — direct.

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that it will be paid for, we cannot see that we should allow it to be used unless such assurance is given, and we do not see anything in the Statute which you have quoted to us which abrogates our right to foreclose our chattel mortgage and take the engine.

“We trust you understand our position in the matter, which is that we do not care to allow the engine to continue to be used and to 193 take our chances of the small percentage that is likely to be paid to the creditors of the Taylor-Moore Construction Co. May we ask that you will advise us what we may expect?

Yours truly,

BUFFALO PITTS COMPANY.

The Witness: I think, if I might be allowed 194 to make one statement there further in regard to that statute. I think that the statute requires that the United States Government shall first satisfy its own claim of every nature, and after that, if there is anything left, the creditors of the contractor may get it—the surplus.

We received a reply to our letter, under date of August 30th, 1905.

195

Plaintiff offers and reads in evidence letter dated August 30, 1905, as follows:

“Department of the Interior,
United States Geological Survey,
Reclamation Service.
Washington, D. C., Aug. 30, 1905.

196

John B. Olmsted — direct.

The Buffalo Pitts Co.,
Buffalo, N. Y.

Gentlemen:—

197

Referring to your letter of August 22, 1905, in reference to your claim in connection with an engine furnished the Taylor-Moore Construction Co., under its contract with the Government for the construction work under the Hondo Project, New Mexico, you are advised that the matter has been referred to the Engineer in the field for a statement, on receipt of which you will be further advised.

Very truly yours,

A. P. DAVIS,

Ass't. Chief Engineer."

198

After the receipt of this letter to which I have just testified I gave instructions for this man to go from Dallas to see whoever was in charge. We received a report from the Dallas office by Mr. Hockenbuhl going there on that mission.

199

We also received a letter from the Department of the Interior, under date of September 26th, 1905.

Plaintiff offers and reads in evidence letter dated September 26th, 1905, as follows:

“Department of the Interior,
United States Geological Survey,
Reclamation Service.

Washington, D. C., Sept. 26, 1905.

The Buffalo Pitts Co.,

Buffalo, N. Y.

Gentlemen:—

In reference to your letter of August 22, 1905, and to letter from this office of August 30, 1905, advising you that the matter of your claim in connection with an engine furnished the Taylor-Moore Construction Company, under its contract with the Government for construction work under the Hondo Project, New Mexico, was referred to the engineer in the field for a statement, you are advised that the engineer in charge reports that the engine was furnished and was in use upon the work before any instrument was filed showing title in any one other than the contractors. Upon default of the contractors, the Government under the terms of the contract which was in force at the time the chattel mortgage is said to have been filed, took possession of all the machinery, tools and appliances belonging to the contractor, upon the ground.

“The status of the machinery in question is the same as that of other machinery, tools, stock, etc., belonging to the contractors and taken over by the government in pursuance of the express terms of the contract, and until the work is completed and matters under the contract are finally adjusted, no change

204

John B. Olmsted—direct.

in the status of the machinery can be made
nor claims thereto recognized.

Very truly yours,

F. H. NEWELL,
Chief Engineer."

Among the papers that I procured in support
205 of the claim filed, there was a statement from
W. M. Reed, the Civil Engineer, dated June 4,
1908. (Paper shown to witness). This is a
copy of the original on file in the Department of
the Interior. It was a part of our claim that
we filed with the Government.

Letter marked Plaintiff's Exhibit 14.

206 *"Pertaining to Contracts—Hondo Reservoir.*
Department of the Interior,
United States Geological Survey,
Reclamation Service.

Carlsbad, N. M., June 4th, 1908.

Buffalo Pitts Engine Co.,
c-o Mr. R. B. George,
Amarillo, Texas.

207 Messrs.:—

"Referring to your request by telephone
for information concerning dates of contracts,
etc., on Hondo Project, New Mexico:

"The Taylor Moore Construction Co. as-
signed to the United States their interest in
their contract on the Hondo Project, on June

John B. Olmsted — direct.

208

7, 1905, and the United States on that date took charge of all material supplies, and equipment belonging to them.

“The United States entered into contract with Wood, Bancroft & Doty to finish a part of the unfinished work of the Taylor-Moore Co., on November 13, 1905. Wood, Bancroft & Doty finished their contract on June 21, 1906. Since the last mentioned date the 209 Buffalo Pitts engine under discussion has not been used by the United States or any of its agents.

Yours very truly,

W. M. REED,
District Engineer.”

210

No part of our chattel mortgage was ever paid; we took the engine back in 1906 at \$500; we received a certain amount as proceeds of the sale of that engine after it came back into our possession; I knew the market value of the Buffalo Pitts engine in May and June, 1905.

Q. What was the value of this engine on May 20th, 1905, the day it was sold to the Taylor-Moore Construction Company? 211

Objected to by defendant as incompetent, immaterial and not the proper measure of damages in this case.

Objection overruled and exception to the defendant.

212

A. \$1,820.00. That is the Houston price, and the freight was to be added to that, to put it in New Mexico. That was the contract. There was an understanding and agreement between the Pitts Company and the Government as to how we should proceed to ascertain the damages, if any, the Government should be liable for. I went to Washington in April, 1907, to see the Reclamation officials; I saw Morris Bien, and we agreed that would be a fair way to determine what the use was, if the Government should pay for it at all; what the value of the engine was when it was put on the work and what a reasonable appraisal would say it was worth when they got through with it, would reasonably approximate what the Government ought to pay for it, if anything. This appraisal by Elzer D. Anderson was
213 made pursuant to that agreement at that time
214 before we took it away.

Cross-examination:

The purchase price of the engine was \$1,820.00; the Pitts Company received a down payment of \$145.00, the difference of \$75.00 was allowed to the Taylor-Moore Construction Company for freight
215 charges. I saw Morris Bien in Washington; he represented the Reclamation Service; I was referred to him as the man having charge of this matter; he was the Acting Director of the Department of the Interior; I was referred to him by Mr. Garfield, Secretary of the Interior. I had a talk with Secretary Garfield and he sent me to

various officers until finally I reached Mr. Bien; I presented our case to Mr. Bien and told him the circumstances about as they have been detailed here in Court; he admitted that our case was a good one and he thought that the Government ought to pay for the engine, but he said it was a matter of law to be decided whether the Government was liable or not; he referred me to Mr. Tracewell of the Treasury, and I went over 217 and argued the matter with him. Mr. Tracewell who was a pretty good politician, I think, said he didn't propose to settle the troubles of the Reclamation Department, and I had better go back to it. I finally left the matter with the arrangement that I should present a statement of all the facts to Mr. Bien, and he would look it over and get some legal advice from someone of the counsel of his Department. I subse- 218
quently made such a statement and received the opinion that the Government was not legally liable. All the gentlemen that I talked with said that morally and equitably they thought the Government ought to pay for the engine, but the claim was rejected.

To the Court: The engine was left as those things usually are. They had gotten through with it. Nobody was paying very much atten- 219
tion to it. We directed our people to go and get hold of it. We did not have any correspondence with anybody with reference to it, that I recollect. We simply went up there, I think. My recollection of it, Judge, was it was stored under the canopy of Heaven. It was a long ways from our

Elzer D. Anderson — Affidavit.

220

base of operations, and, as has been testified here, it would cost \$75.00 or \$100.00 to send a man up there, and we didn't send them any oftener than we could help.

The following affidavit of Elzer D. Anderson was offered and received in evidence, with the same effect as if it were a deposition duly taken herein :

221

AFFIDAVIT.

TERRITORY OF NEW MEXICO,
COUNTY OF CHAVES.

222

ELZER D. ANDERSON, Mechanical Engineer of Roswell, New Mexico, after being duly sworn upon his oath, states that he has carefully examined the twenty-two horse power traction engine formerly sold by Buffalo Pitts Company to the Taylor-Moore Construction Company, and then attached by the United States Government, the same being now located at the Hondo Reservoir in and near the vicinity of Roswell, and finds that, according to the treatment the same has received, and taking into consideration its present location, it is worth the sum of \$500.00, which, in his judgment, is a fair valuation of said engine.

223

E. ANDERSON.

Subscribed and sworn to before me
this 4th day of June, 1908.
(Seal)

ALTA HOLDEKER,
Notary Public."

The plaintiff offers and reads in evidence the deposition of Augustus T. Renfroe, duly taken in this action, as follows:

I live at Amarillo, Texas; I am travelling salesman for the plaintiff; in 1905 I was a salesman and collector for it; in 1906 I called on W. H. H. Llewellyn, United States Attorney, at his office in Roswell, New Mexico; he had charge of the controversy concerning this engine for the United States; I asked him for possession of this engine; I explained to him that the plaintiff had a chattel mortgage on it given by the Taylor-Moore Construction Company; he refused possession; he said the Government's engineer was in Washington and that he could not do anything until the engineer returned; I asked him to write me at Amarillo, Texas, whether or not I could come down and get the engine; he said he would but that he felt sure I could not take possession of the engine until the matter went through the United States Courts; he never wrote me that I could get the engine; I wrote him regarding the matter and received a reply; I do not remember the exact words, but it was to the effect that I could not have possession of the engine. When I first saw this engine it was standing out on open ground near Roswell, where it had been used in the construction of the Hondo Dam by the Government. I do not know just how long since it had been used, but it was badly eaten with rust, and had been robbed of its parts until nothing much was left but the wheels and boiler.

228

U. F. Short — deposition.

When I saw this engine in 1906, what was left of it, in my estimation, was not worth more than \$350.

The plaintiff also offers and reads in evidence the deposition of U. F. Short, duly taken in this action, as follows:

I reside at Dallas, Texas; I am an attorney.
229 In 1905 I was consulted by the plaintiff regarding this engine; the plaintiff's manager in Texas consulted me with reference to the collection of the purchase money; he presented the notes and chattel mortgage and asked what steps should be taken for collection. We ascertained that the Taylor-Moore Construction Company was insolvent and that the Government had taken the work in charge together with all machinery, implements
230 and tools which had been used on the work. I told him to demand possession of the engine from the persons in charge; I advised the recovery of the mortgaged property; all I know about what was done with respect to my advice was what I was told; I did not come in contact with any United States officer in relation to the matter; I know nothing personally of the use or disposition of the engine by the Government, except what
231 was told me by the employees of the plaintiff.

The plaintiff then rested its case.

The defendant moved for a dismissal of the plaintiff's bill upon the following grounds:

1. That the plaintiff cannot recover herein because at the time of the taking over of

the engine by the defendant the plaintiff was 232
not in possession and was not entitled to possession of the engine and had no right or authority to make or enter into any contract for its use. The remedy of the plaintiff was confined by the chattel mortgage to the sale of the mortgaged property and the application of the proceeds of such sale to the extinguishment of its debt.

2. That the proof of the plaintiff fails to 233
establish any action of the defendant from which an implied promise to pay for the engine can be found or that those with whom the alleged conversations and transactions occurred had any authority to bind the defendant to any such contract or agreement.

3. That the Court has no jurisdiction of this suit. The bill is framed to recover for 234
the reasonable value of the use of the engine under an implied contract to pay therefor, but the reasonable construction of all the evidence of the plaintiff tends to establish a wrongful retention of the engine following a lawful taking.

4. That there was no competent evidence or proof as to any damages sustained by the 235
plaintiff.

The Court denied the motion of the defendant upon all the grounds stated and to such ruling of the Court the defendant duly excepted.

Wendell M. Reed — deposition.

236

The defendant offers and reads in evidence the deposition of Wendell M. Reed, duly taken in this action, as follows:

I reside at El Paso, Texas; I am a Civil Engineer; I am employed as District Engineer in the United States Reclamation Service for the District of Texas and New Mexico. In June, 1905, I was in the Reclamation Service as engineer in
237 charge of the Hondo Project, and continued in that position for a year thereafter, and I then lived at Roswell, New Mexico; my duties at that time in connection with the irrigation projects, were those of engineer in charge both of the engineering and local executive duties; I was then employed by the Department of the Interior, Bureau of Reclamation Service; my duties were to supervise the construction of the Hondo and
238 Carlsbad Projects and to be the local representative of the Reclamation Service there; in fact, I was the agent of the United States in all matters pertaining locally to these Projects. I am not positive that I have met Mr. Hockenhull, Mr. Short or Mr. Anderson, but have a recollection of meeting some representatives of the Buffalo Pitts Company, these people purporting to come from somewhere in Texas; the name Hockenhull
239 sounds familiar, and it is quite possible I did meet him, and have conversation with him upon matters pertaining to the Taylor-Moore Construction Company during the year 1905; I recollect meeting some representatives of the Buffalo Pitts Company and having conversations with them upon

matters pertaining to the Taylor-Moore Construction Company in 1905; I may have had such a conversation with Mr. Hockenhull; I do not recall any conversation with either of the others; I cannot give the time and place where such conversation occurred, but it must have occurred at Roswell, New Mexico, and it pertained to the transactions of the United States with the Taylor-Moore Construction Company; the Tay- 241
lor-Moore Construction Company forfeited its contract with the United States for the construction of the Hondo Reservoir; there was considerable trouble in the matter due to claimants having claims against the Taylor-Moore Construction Company or interest in its business or equipment. It is my recollection that Mr. Hockenhull had an interview with me in regard to the claim of the Buffalo Pitts Company to some machinery 242
which was in possession of the Taylor-Moore Construction Company when they forfeited their contract to the United States; if I remember correctly the conversation related to the traction engine claimed by the Buffalo Pitts Company under a mortgage held by it from the Taylor-Moore Construction Company; I don't know whether I had more than one conversation with Mr. Hockenhull or not; it is possible that I had 243
more than one such conversation; I cannot give the exact words that passed between us, but remember that I took the position that being the agent of the United States my actions would be wholly controlled by the terms of the contract

Wendell M. Reed — deposition.

244

between the United States and the Taylor-Moore Construction Company.

In answer to cross-interrogatories, this witness testified as follows:

In 1905 and 1906 I was District Engineer of the Reclamation Service of the United States in New Mexico; I did then and there have charge
245 of the work being prosecuted by said Government known as the Hondo Project; on or about June 5th, 1905, the United States suspended the operations of the Taylor-Moore Construction Company on the Hondo Project; on or about that date, on behalf of the Government, I took possession of all the machinery and equipment then in the possession of the Construction Company located on the property of the United States in the vicinity
246 of the Hondo Project, including the Buffalo Pitts engine; I do not remember of at any time delivering possession of that engine to the Buffalo Pitts Company; I do not remember any particular conversation with Mr. Hockenull upon his asking me for possession of the engine, when I said I would not deliver it, but I stated to all claimants that I was acting entirely under the terms of the contract with the Taylor-Moore Construction Company and would surrender no machinery or equipment which that contract permitted the Government to retain. I do not remember the particular statements of Mr. Hockenull as to an amount being due to said Buffalo Pitts Company for the purchase price of said traction engine and its being secured by a chat-

247

tal mortgage on file in the Recorder's office of Chaves County, New Mexico, but do remember that each claimant asserted his perfect title, etc., and was in each case referred by me to the contract, and for any further recourse, to the Courts. I do not remember in particular whether Mr. Hockenbuhl claimed to have a chattel mortgage of record in the Recorder's office of Chaves County, or not; at that time I didn't know whether the 249 Government would continue the work or sublet the contract; it was optional with the Government which method should be followed; in fact, a portion of the work was done by the Government and another portion was sublet; I considered the traction engine useful in the work, but not absolutely necessary; I don't remember ever making a statement that it would be right for the Government to surrender possession of the en- 250 gine to the Buffalo Pitts Company or pay what was due; I do not recall a conversation with Mr. Hockenbuhl on that subject; the engine was used in the completion of the work after the Taylor-Moore contract was forfeited; possession and use of the engine were taken under the terms of the contract with the Taylor-Moore Construction Company, and I believe that the Government had a perfect right under the contract to retain and 251 use this engine as well as all other equipment formerly in possession of the Construction Company for the completion of the work embraced in its contract.

252 Defendant also offers and reads in evidence Chapter 1, Title 27 of the Laws of New Mexico, in force at the time of the execution and recording of the chattel mortgage, exhibit 1, particularly sections 2365, 2367 and 2368, as follows:

Section 2365:

253 "In the absence of stipulation to the contrary the mortgagor of real or personal property shall have the right of possession thereof."

Section 2367:

254 "After condition broken, the mortgagee or its assignee may proceed to sell the mortgaged property or so much thereof as shall be necessary to satisfy the mortgage and cost of sale; having first given notice of the time and place of sale, by written or printed handbills posted up in at least four public places in the precinct in which the property is to be sold at least ten days previous to the day of the sale."

Section 2368:

255 "If the mortgagee or his assignee shall have obtained possession of the mortgaged property either before or after conditions broken, the mortgagor or any subsequent mortgagee may demand in writing a sale of such property. In such case the mortgagee shall proceed to sell the property having first

given the notice as provided in the preceding 256
section."

Defendant rests and evidence closed.

The defendant thereupon renewed its motion for dismissal of the bill in this suit upon the same grounds as were specified in this motion made at the close of plaintiff's evidence, and upon the further ground that as the taking of the engine by the Government was a lawful tak- 257
ing, no action to recover will lie against the defendant. After argument by counsel the Court said: I think I will hold in this case that the Government, by its action through the engineer then in charge of the work, is estopped from claiming at this time that the plaintiff should have taken possession of this property and should have followed the legal remedy pointed 258
out by the statute. The Government, knowing that this chattel mortgage had been made to the mortgagee, took possession of the property and used the engine for a period of time, and when demand was made for the possession of it, the officer insisted that the Government would retain the possession of it notwithstanding anything that might be done by the plaintiff towards regaining possession, and the Government would hold it 259
and use it. They have held the machine; they have used it; they have had the benefit of it. I am inclined to think that I ought to permit the plaintiff to have judgment for the damages which they have shown. Now, the damages, as I under-

260 stand them, as claimed in the complaint, are the difference between the value of the engine at the time it was sold, subject to the payment of \$145.50 which was made upon it, and the value as it was subsequently appraised after its use by the Government, namely \$500.

The motion was denied upon all the grounds specified and the defendant duly excepted.

261 The Court thereupon made, signed and filed its findings of fact and conclusions of law and judgment was duly granted and entered herein in favor of the plaintiff and against the defendant for the sum of \$1,504.85 damages, and \$54.00 costs, amounting in all to the sum of \$1,558.85.

262 UNITED STATES CIRCUIT COURT.
WESTERN DISTRICT OF NEW YORK.

	BUFFALO PITTS COMPANY,	}
	<i>Plaintiff,</i>	
	AGAINST	
	THE UNITED STATES OF	}
	AMERICA,	
263	<i>Defendant.</i>	

IT IS HEREBY STIPULATED by and between the attorneys for the respective parties to the above entitled action that the foregoing bill of excep-

tions, including the exhibits therein contained, 264
contains all the evidence produced and proceed-
ings had upon the trial of the above entitled ac-
tion, and that the same may be settled, allowed
and filed.

Dated, Buffalo, N. Y., June 19th, 1911.

WHITE & BABCOCK,
Attorneys for Plaintiff.

265

JOHN LORD O'BRIAN,
United States Attorney,
in and for the West-
ern District of New
York, and attorney
for the defendant.

266

UNITED STATES CIRCUIT COURT.

WESTERN DISTRICT OF NEW YORK.

BUFFALO PITTS COMPANY,	}
<i>Plaintiff,</i>	
AGAINST	
THE UNITED STATES OF	
AMERICA,	}
<i>Defendant.</i>	

267

The foregoing is all the evidence and proceed-
ings had and taken upon the trial of the above

268 entitled action, and, inasmuch as the exceptions thereto do not appear of record,

IT IS HEREBY ORDERED, That this, the defendant's bill of exceptions herein, be, and the same hereby is, settled and allowed as hereinbefore set forth.

IT IS FURTHER ORDERED, That the said bill of exceptions may be filed nunc pro tunc as of the 9th day of February, 1911, and annexed to the
269 judgment roll herein.

Dated, Buffalo, N. Y., June 27th, 1911.

JOHN R. HAZEL,
United States District Judge.

270 UNITED STATES CIRCUIT COURT OF
APPEALS—FOR THE SECOND CIRCUIT.

<p>THE UNITED STATES OF AMERICA, <i>Plaintiff-in-Error,</i> AGAINST BUFFALO PITTS COMPANY, 271 <i>Defendant-in-Error.</i></p>	}	<p>Assignments of Error.</p>
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The United States of America, plaintiff-in-error (defendant in Court below), by John Lord O'Brian, United States Attorney in and for the

Western District of New York, alleges that in the 272
record and proceedings in this case and in the
final judgment therein, there is manifest error in
the following named and other particulars, viz:

1. The Court erred in receiving the testimony
offered in behalf of the defendant-in-error by the
witness, George Hockenhull, as to any conversa-
tion between the witness and W. H. H. Llewellyn,
United States Attorney for New Mexico, tending 273
to establish any agreement that the United States
would pay for the use of the engine mentioned by
the witness, to the reception of which testimony
the plaintiff-in-error duly objected.

2. The Court erred in receiving the testi-
mony offered in behalf of the defendant-in-error
by the witness, John B. Olmsted, as to the mar-
ket value of the engine referred to by the witness,
in the months of May and June, 1905, to the recep- 274
tion of which testimony the plaintiff-in-error duly
objected.

3. The Court erred in denying the motion of
the plaintiff-in-error made at the close of the
proof of the defendant-in-error to dismiss the bill
of complaint herein upon the ground that the
defendant-in-error cannot recover herein because
at the time of the taking over of the engine by the 275
plaintiff-in-error the defendant-in-error was not
in possession and was not entitled to possession
of the engine and had no right or authority to
make or enter into any contract for its use. The
remedy of the defendant-in-error was confined by

276 the chattel mortgage to the sale of the mortgaged property and the application of the proceeds of such sale to the extinguishment of its debt, and to which ruling of the Court the plaintiff-in-error duly excepted.

277 4. The Court erred in denying the motion of the plaintiff-in-error made at the close of the proof of the defendant-in-error to dismiss the bill of complaint herein upon the ground that the proof of the defendant-in-error fails to establish any action of the plaintiff-in-error from which an implied promise to pay for the engine can be found or that those with whom the alleged conversations and transactions occurred had any authority to bind the plaintiff-in-error to any such contract or agreement; and to which ruling of the Court the plaintiff-in-error duly excepted.

278 5. The Court erred in denying the motion of the plaintiff-in-error made at the close of the proof of the defendant-in-error to dismiss the bill of complaint herein upon the ground that the Court has not jurisdiction of this suit. The bill is framed to recover for the reasonable value of the use of the engine under an implied contract to pay therefor, but the reasonable construction of all the evidence of the defendant-in-error tends
279 to establish a wrongful retention of the engine following a lawful taking; and to which ruling of the Court the plaintiff-in-error duly excepted.

6. The Court erred in denying the motion of the plaintiff-in-error made at the close of the

proof of the defendant-in-error to dismiss the 280
bill of complaint herein upon the ground that
there was no competent evidence or proof as to
any damages sustained by the defendant-in-error;
and to which ruling of the Court the plaintiff-in-
error duly excepted.

7. The Court erred in denying the motion of
the plaintiff-in-error made at the close of the case
to dismiss the bill of complaint herein upon all of 281
the grounds specified in the motion made at the
close of the proof of the defendant-in-error and
upon the further ground that, as the taking of
the engine by the Government was a lawful tak-
ing, no action to recover will lie against the plain-
tiff-in-error; and to which ruling of the Court
the plaintiff-in-error duly excepted.

8. The Court erred in making the finding or
decision contained in its written decision and find- 282
ings dated February 27th, 1911, and therein num-
bered "VI", in the words and figures following:

"That on or about the 16th day of June,
1905, at Roswell, New Mexico, the plaintiff by
its agent made a demand upon the defendant
through Wendell M. Reed, District Engineer
of the Reclamation Service, under the
Department of the Interior, for the posses- 283
sion of said engine and appurtenances, which
the defendant then and there refused, and
thereafter, the defendant retained and used
said property in the work under said contract
until June 21, 1906";

284 and to which finding or decision the plaintiff-in-error duly excepted.

9. The Court erred in making the finding or decision contained in its written decision and findings dated February 27th, 1911, and therein numbered "VII", in the words and figures following:

285 "That said Wendell M. Reed was during said period, and before and after the same, the local representative of the Government in charge of the work under said contract, at and near Roswell, New Mexico, and as such took possession of said engine and appurtenances for the United States, and thereafter the defendant, by the Director of the U. S. Geological Survey, to whom the Secretary of the Interior referred said matter, and by the 286 Chief Engineer and Assistant Chief Engineer of the Reclamation Service, under the direction of said Department, ratified and adopted the acts of said Wendell M. Reed, District Engineer, in respect to the possession of said engine and appurtenances";

and to which finding or decision the plaintiff-in-error duly excepted.

287 10. The Court erred in making the finding or decision contained in its written decision and findings dated February 27th, 1911, and therein numbered "X", in the words and figures following:

"That during the use and occupation of 288 the said engine and appurtenances by the defendant, the plaintiff, to-wit: on or about June 16, 1905, and also on or about September 30, 1905, notified the defendant of the execution and filing of said mortgage as aforesaid and that the plaintiff claimed the said property under the title thereby vested in it and claimed the right of possession, because of the default by the mortgagor in the 289 conditions thereof, and that the defendant at all said times well knew of the existence and filing of said chattel mortgage and did not at any time dispute the validity thereof, and on September 30, 1905, represented to the plaintiff that the defendant was using and would continue to use said engine in said work and that any legal proceedings to recover the possession thereof would be resisted and de- 290 feated by the defendant, and further represented to the plaintiff that if said property were left in the defendant's possession, its attorney would recommend payment by the defendant therefor.";

and to which finding or decision the plaintiff-in-error duly excepted.

291

11. The Court erred in making the finding or decision contained in its written decision and findings dated February 27th, 1911, and therein numbered "XI", in the words and figures following:

292 “‘That the plaintiff relied upon the fact that its title to the property under the chattel mortgage was not disputed by the defendant and upon the representations made to it as aforesaid and consented to defendant’s retaining possession of said property in expectation of receiving due compensation therefor.’”;

293 and to which finding or decision the plaintiff-in-error duly excepted.

12. The Court erred in making and deciding the conclusion of law contained in its written decision and findings dated February 27th, 1911, and therein numbered “1”, in the words and figures following:

294 “‘That the plaintiff was the lawful owner of the said property of June 16, 1905, when it demanded the possession thereof from the defendant and was then entitled to the possession thereof as against the said mortgagor, the Taylor-Moore Construction Co., and its assigns.’”;

and to which conclusion of law the plaintiff-in-error duly excepted.

295 13. The Court erred in making and deciding the conclusion of law contained in its written decision and findings dated February 27th, 1911, and therein numbered “2”, in the words and figures following:

“That after the aforesaid refusal by the 296
defendant of such demand, the defendant was
liable to the plaintiff under an implied con-
tract to pay proper compensation for the use
and occupation of said property.”;

and to which conclusion of law the plaintiff-in-
error duly excepted.

14. The Court erred in making and deciding 297
the conclusion of law contained in its written deci-
sion and findings dated February 27th, 1911, and
therein numbered “3”, in the words and figures
following:

“That the defendant is estopped by the
conduct of its officers and representatives
from denying that the said engine and its
appurtenances were the property of the
plaintiff.”;

298

and to which conclusion of law the plaintiff-in-
error duly excepted.

15. The Court erred in making and deciding
the conclusion of law contained in its written deci-
sion and findings dated February 27th, 1911, and
therein numbered “4”, in the words and figures
following:

“That the plaintiff is entitled to recover 299
against the defendant the sum of \$1,174.60,
with interest thereon from June 21, 1906, to-
gether with the costs and disbursements of
this action.”;

300 and to which conclusion of law the plaintiff-in-error duly excepted.

Dated, Buffalo, N. Y., June 29th, 1911.

JOHN LORD O'BRIAN,

*Attorney of the United
States in and for the
Western District of
New York.*

301

405 Federal Building,
Buffalo, N. Y.

UNITED STATES CIRCUIT COURT.

WESTERN DISTRICT OF NEW YORK.

302 BUFFALO PITTS COMPANY,

Plaintiff,

AGAINST

THE UNITED STATES OF
AMERICA,

Defendant.

No. 303 Order for
Writ.

303 Upon motion of John Lord O'Brian, Attorney of the United States in and for the Western District of New York, and attorney for the defendant in the above entitled cause, and, upon filing a petition for a writ of error, and upon filing an assignment of errors,

It is ordered, That a writ of error be, and it 304
is, hereby allowed to have reviewed in the United
States Circuit Court of Appeals for the Second
Circuit, the judgment heretofore entered herein
on the 1st day of March, 1911, and that all
further proceedings in this Court be suspended
and stayed until the determination of said writ
of error by the said United States Circuit Court
of Appeals for the Second Circuit.

305

JOHN R. HAZEL,

United States Judge.

UNITED STATES CIRCUIT COURT.

WESTERN DISTRICT OF NEW YORK.

306

BUFFALO PITTS COMPANY,

Plaintiff,

AGAINST

THE UNITED STATES OF
AMERICA,

Defendant.

Petition for Writ.

307

And now comes the United States of America,
the defendant herein, and says that this Court
having directed a verdict in favor of the plaintiff
on the 9th day of February, 1911, on the trial of

308 the above entitled cause, to which the defendant
 duly excepted, and said Court on the 28th day of
 February, 1911, having filed its findings of fact
 and conclusions of law, to which the said defend-
 ant has also duly excepted, a judgment pursuant
 to said direction of verdict, findings of fact and
 conclusions of law, was entered herein on the 1st
 day of March, 1911, in favor of the plaintiff and
 against the defendant, in which said judgment
 309 and the proceedings had prior thereto in this
 cause, certain errors were committed, to the
 prejudice of this defendant, all of which will
 more in detail appear from the assignment of
 errors which is filed with this petition.

WHEREFORE, this defendant prays that a writ of
 error may issue in this behalf out of the United
 States Circuit Court of Appeals for the Second
 310 Circuit, for the correction of errors, so com-
 plained of, and that a transcript of the record,
 proceedings and papers in this cause duly authen-
 ticated, may be sent to the said Court of Appeals.

Dated, Buffalo, N. Y., 30th day of June, 1911.

JOHN LORD O'BRIAN,

311 *Attorney of the United*
States in and for the
Western District of
New York, and attor-
ney for defendant.

405 Federal Building,

Buffalo, N. Y.

WRIT OF ERROR.

312

UNITED STATES OF AMERICA—ss.

*The President of the United States of America,
to the Honorable John R. Hazel, Judge of the
United States Circuit Court for the Western
District of New York, and to said Court,*

Greeting:

Because in the record and proceedings, as also 313
in the rendition of the judgment which is in the
said Circuit Court before you, between the Buffalo
Pitts Company, plaintiff, and the United States of
America, defendant, a manifest error hath hap-
pened to the great prejudice of the said plaintiff,
as is said and appears by the petition and assign-
ment of errors herein:

We, being willing that such error, if any hath 314
happened, should be duly corrected and full and
speedy justice done to the parties aforesaid in
this behalf, do command you, if judgment be there-
in given, that then under your seal, distinctly and
openly, you send the record and proceedings
aforesaid, with all things concerning the same, to
the Judges of the United States Circuit Court of
Appeals for the Second Circuit at the court rooms
of said Court, in the Post Office Building in the
City of New York, in the State of New York, to- 315
gether with this writ, so as to have the same at
the said place in said Circuit on or before the 29th
day of July, 1911, that the record and proceedings
aforesaid being inspected, the said Judges of
United States Circuit Court of Appeals for the

316 Second Circuit may cause further to be done therein to correct that error what of right and according to law and customs of the United States ought to be done.

Witness: The Honorable Edward D. White,
Chief Justice of the Supreme Court of the United
States, this 30th day of June, 1911.

HARRIS S. WILLIAMS,

317

*Clerk of the United States Circuit
Court, for the Western
District of New York.*

The foregoing writ of error is hereby allowed
this 30th day of June, 1911.

JOHN R. HAZEL,

318

United States Judge.

THE UNITED STATES CIRCUIT COURT OF
APPEALS—FOR THE SECOND CIRCUIT.

THE UNITED STATES OF AMERICA,

WESTERN DISTRICT OF NEW YORK—SS. } Citation.

To Buffalo Pitts Company:

319 *Greeting:*

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at a session of the United States Circuit Court of Appeals for the Second Circuit, to be holden at the City of New York, in said Circuit, on the 29th day of July, 1911, next, pursuant to

a writ of error filed in the Clerk's office of the 320
 United States for the Western District of New
 York, wherein the United States of America are
 plaintiffs-in-error, and you are defendant-in-error,
 to show cause, if any there be, why the judgment
 rendered in said cause as in the said writ of error
 mentioned, should not be corrected, and why
 speedy justice should not be done to the parties
 in that behalf.

321

WITNESS, the Honorable Edward D. White,
 Chief Justice of the Supreme Court of the United
 States of America, this 30th day of June, A. D.,
 1911.

JOHN R. HAZEL,
United States District Judge,
 sitting in the Circuit Court. 322

Attest:

HARRIS S. WILLIAMS,
Clerk United States Circuit Court,
 For the Western District of New York.

323

324 UNITED STATES CIRCUIT COURT.
WESTERN DISTRICT OF NEW YORK.

BUFFALO PITTS COMPANY,

Plaintiff,

AGAINST

THE UNITED STATES OF
AMERICA,

Defendant.

Stipulation.

325

IT IS HEREBY STIPULATED, That the printed record on appeal by the defendant from the decree and judgment heretofore granted and entered herein shall contain the following papers: Petition, answer, decision and findings, judgment, exceptions to decision and findings, bill of exception, including the transcript of evidence and exhibits therein contained, assignments of error, petition and order for writ of error, writ of error, citation, order extending time to forward record and this stipulation.

326

Dated, Buffalo, N. Y., September 7th, 1911.

WHITE AND BABCOCK

Attorneys for Plaintiff.

327

JOHN LORD O'BRIAN,

*United States Attorney in
and for the Western
District of New York,
and attorney for the
defendant.*

UNITED STATES CIRCUIT COURT,

328

WESTERN DISTRICT OF NEW YORK.

BUFFALO PITTS COMPANY,

Plaintiff,

AGAINST

THE UNITED STATES OF
AMERICA,*Defendant.*

329

ON MOTION of John Lord O'Brian, Attorney of the United States in and for the Western District of New York, and attorney for the above named defendant,

IT IS ORDERED, That the time within which the above named defendant may send the record and proceedings, with all things concerning the same, together with the writ of error, in the above entitled action, be and the same is hereby extended to and including the 2d day of October, 1911, and that this order be, and the same is, hereby granted *non pro tunc* as of the 29th day of July, 1911, to be entered as of that date.

Dated, Buffalo, N. Y., September 18th, 1911.

331

JOHN R. HAZEL,

United States Judge.

332 UNITED STATES OF AMERICA,
WESTERN DISTRICT OF NEW YORK—SS.

I, Harris S. Williams, Clerk of the Circuit Court of the United States for the Western District of New York, do hereby certify the foregoing to be a transcript of the records of the Circuit Court, in the cause named at the beginning thereof, made up pursuant to Rule XIV of the Rules of the
333 United States Circuit Court of Appeals for the Second Circuit; Rule XXXI of the Supreme Court of the United States, and Rules 1, 2, 3 and 4 of the Circuit Court of the United States for the Western District of New York, adopted to conform the practice of the Clerk's office to the provisions of the "Act to Diminish the Expense of Proceedings on Appeal," passed February 13, 1911.

334 IN TESTIMONY WHEREOF, I have hereunto signed my name, and caused the seal of said Court to be affixed at the City of Buffalo, in said District, the .. day of September, Anno Domino Nineteen Hundred and Eleven.

HARRIS S. WILLIAMS,

335 *Clerk United States Circuit
Court, Western District
of New York.*

55 United States Circuit Court of Appeals, for the Second Circuit.

No. 139.—October term, 1911.

Argued January 5, 1912. Decided January 29, 1912.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

THE BUFFALO PITTS COMPANY, DEFENDANT IN ERROR. }

In error to the Circuit Court of the United States for the Western District of New York.

Before Lacombe, Ward, and Noyes, circuit judges.

WARD, Circuit Judge:

This is a writ of error to a judgment of the Circuit Court sitting as a Court of Claims under the Tucker Act of March 3, 1887, 24 Stat., 505, in favor of the plaintiff and against the United States.

The Government had under the reclamation act of June 17, 1902, 32 Stat., 389, entered into a contract with the Taylor-Moore Construction Company to build the Hondo Dam in connection with the Hondo Project in New Mexico. Section 7 of that act provides:

"That where in carrying out the provisions of this act it becomes necessary to acquire any rights or property, the Secretary of the Interior is hereby authorized to acquire the same for the United States by purchase or by condemnation under judicial process, and to pay from the reclamation fund the sums which may be
86 needed for that purpose, and it shall be the duty of the Attorney-General of the United States upon every application of the Secretary of the Interior, under this act, to cause proceedings to be commenced for condemnation within thirty days from the receipt of the application at the Department of Justice."

It was a condition of the contract that upon the construction company's default the Government might take over the contract and possession of all the construction company's machinery delivered on the ground for the purpose of completing the work.

The plaintiff sold to the construction company a traction engine to be used in this contract and the company executed a chattel mortgage thereon to the plaintiff to secure the payment of the price.

June 7, 1905, upon the construction company's default, the Government did rightfully take over the contract and all the company's property which included the construction company's interest in the traction engine as mortgagor.

June 20, 1905, the plaintiff which as mortgagee was always the owner of the engine, 6 Cyc. 985; *Kitchin v. Shuster*, 14 N. M., 161, became entitled to the possession of it because of the construction company's failure to pay the first note falling due that day.

The Government refused to deliver the engine to the plaintiff on its demand, continued to use it in the work, and the plaintiff having

notified the Government of its title and right to compensation, took no further proceedings, if indeed, any could have been taken against the United States in the matter.

After the Hondo Dam was completed the Government abandoned the engine, the plaintiff took possession of it and began this action to recover the fair and reasonable value of its use.

There was no need for formal proceedings in condemnation, and the rights of the plaintiff were not prejudiced by the omission of the Government to take them. As Mr. Justice Brewer said in *United States v. Lynah*, 188 U. S., 445, at 467:

"This brings the case directly within the scope of the decision in *United States v. Great Falls Manufacturing Company*, supra, where, as here, there was no direction to take the particular property, 87 but a direction to do that which resulted in a taking, and it was held that the owner might waive the right to insist on condemnation proceedings and sue to recover the value.

"It does not appear that the plaintiffs took any action to stop the work done by the Government, or protested against it. Their inaction and silence amount to an acquiescence—an assent to the appropriation by the Government. In this respect the case is not dissimilar to that of a landowner who, knowing that a railroad company has entered upon his land and is engaged in constructing its road without having complied with the statute in respect to condemnation, is estopped from thereafter maintaining either trespass or ejectment, but is limited to a recovery of compensation. *Roberts v. Northern Pacific Railroad*, 158 U. S. 1, 11; *Northern Pacific Railroad v. Smith*, 171 U. S., 260, and cases cited in the opinion."

The trial judge held as a matter of law that the refusal of the Government to deliver possession of the engine to the plaintiff after its right to possession under the chattel mortgage accrued, raised an implied promise to pay for its use.

Sec. 1059, U. S. Rev. Stat., which defined the jurisdiction of the Court of Claims down to the passage of the Tucker Act, so far as relevant reads as follows:

"Sec. 1059. The Court of Claims shall have jurisdiction to hear and determine the following matters:

First. All claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, expressed or implied, with the Government of the United States, and all claims which may be referred to it by either House of Congress."

It is abundantly established by authority that under this section the court had no jurisdiction of claims arising out of tort. In *United States v. Great Falls Manufacturing Co.*, 112 U. S., 645, 656, the Supreme Court, speaking by Mr. Justice Miller, said:

"The making of the improvements necessarily involves the taking of the property; and if, for the want of formal proceedings 88 for its condemnation to public use, the claimant was entitled, at the beginning of the work, to have the agents of the Govern-

ment enjoined from prosecuting it until provision was made for securing in some way, payment of the compensation required by the Constitution—upon which question we express no opinion—there is no sound reason why the claimant might not waive that right, and, electing to regard the action of the Government as a taking under its sovereign right of eminent domain, demand just compensation. *Kohl v. United States*, 91 U. S., 367, 374. In that view, we are of opinion that the United States, having by its agents, proceeding under the authority of an act of Congress, taken the property of the claimant for public use, are under an obligation, imposed by the Constitution, to make compensation. The law will imply a promise to make the required compensation, where property, to which the Government asserts no title, is taken, pursuant to an act of Congress, as private property to be applied for public uses. Such an implication being consistent with the constitutional duty of the Government, as well as with common justice, the claimant's cause of action is one that arises out of implied contract, within the meaning of the statute which confers jurisdiction upon the Court of Claims of actions founded "upon any contract, expressed or implied, with the Government of the United States."

He distinguished the case from *Langford v. United States*, 101 U. S., 341, on the ground that in it the Government claimed the land it took as its own.

Assuming that the law applicable to the present situation is the same as it was before the passage of the Tucker Act, we think the judgment of the court below was right. The Government did not claim any title to the engine nor deny the plaintiff's title. It claimed the right to continue the use of the engine in the public work. This right it had as sovereign and under the 7th section of the reclamation act, subject to the duty of paying for the use and from this duty a promise to pay is to be implied as in *United States v. Great Falls Manufacturing Co.*, supra.

89 The applicable provision of the Tucker Act is this language of the first section:

"First. All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an executive department, or upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable. * * *

Mr. Justice Brown in *Dooley v. United States*, 182 U. S., 222, 224, pointed out the difference between this provision and sec. 1059, saying:

"The first section evidently contemplates four distinct classes of cases: (1) Those founded upon the Constitution or any law of Congress, with an exception of pension cases; (2) cases founded upon a

regulation of an executive department; (3) cases of contract, expressed or implied, with the Government; (4) actions for damages, liquidated or unliquidated, in cases not sounding in tort. The words "not sounding in tort" are in terms referable only to the fourth class of cases."

Mr. Justice White delivered a dissenting opinion in which Justices Gray, Shiras, and McKenna concurred, not involving this question at all. We may assume that if Justice Brown did not speak for the whole court on this point, he did at least speak for Chief Justice Fuller and Justices Harlan, Brewer, and Peckham. However, in *United States v. Lynah*, *supra*, Mr. Justice Brewer delivered the opinion of the court, holding that when the Government takes property not claimed as its own an implied promise to pay is raised. He followed *United States v. Great Falls Manufacturing Co.*, *supra*, and reasoned as if the changed language of the Tucker Act made no change in the law, saying at p. 464:

"The rule deducible from these cases is that when the Government appropriates property which it does not claim as its own it does so under an implied contract that it will pay the value of the property it so appropriates. It is earnestly contended in argument that the Government had a right to appropriate this property. This may be conceded, but there is a vast difference between a proprietary and a governmental right. When the Government owns property, or claims to own it, it deals with it as owner and by virtue of its ownership, and if an officer of the Government takes possession of property under the claim that it belongs to the Government (when in fact it does not) that may well be considered a tortious act on his part, for there can be no implication of an intent on the part of the Government to pay for that which it claims to own. Very different from this proprietary right of the Government in respect to property which it owns is the governmental right to appropriate the property of individuals. All private property is held subject to the necessities of government. The right of eminent domain underlies all such rights of property. The Government may take personal or real property whenever its necessities or the exigencies of the occasion demand. So the contention that the Government had a paramount right to appropriate this property may be conceded, but the Constitution in the fifth amendment guarantees that when this governmental right of appropriation—this asserted paramount right—is exercised it shall be attended by compensation."

Mr. Justice Brown wrote a concurring opinion in which he declined to rest the judgment on an implied contract to pay, holding that the taking was a trespass in which there could be no waiver of the tort and that the Government was obliged to pay under the fifth amendment whether the claim sounded in tort or not. Justices Shiras and Peckham held that the court had jurisdiction on both grounds. Mr. Justice McKenna took no part in the decision. Mr. Justice White for himself and Chief Justice Fuller and Justice Harlan dissented on grounds that did not involve this question at all.

91 We may at least assume that Justices Fuller and Harlan, who concurred in the opinion of the court in the Dooley case, supra, agreed with Justices Shiras and Peckham, thus making a majority of the court that the construction of the Tucker Act taken by Mr. Justice Brown was right.

Accordingly, we think the judgment below right, whether it rested on an implied contract of the Government to pay within the opinion of Mr. Justice Brewer in the Dooley case or upon its constitutional obligation within the opinion of Mr. Justice Brown.

It remains only to distinguish two cases much relied upon by the Government. *Bigby v. United States*, 188 U. S., 400, was an action for damages for personal injuries sustained by the plaintiff as the result of the negligence of a Government servant in running an elevator in the Post Office Building at Brooklyn. It was a pure action in tort, having absolutely nothing to do with the taking of private property. *Hooe v. United States*, 218 U. S., 322, involved the taking of property by the Secretary of the Interior in direct violation of the act of Congress under which he acted. Of course there could be no pretense that he was authorized by the United States to do what he did. There was no taking by the Government and no promise to pay could be implied. But as interest cannot be recovered of the Government except where specially allowed by statute, the court below is directed to strike out the amount included for interest, and the judgment so modified is affirmed.

W. Palmer, Asst. U. S. Attorney, for the plaintiff in error.

E. P. White for the defendant in error.

92 United States Circuit Court of Appeals for the Second Circuit.

No. 139.—October term, 1911.

Argued January 5, 1912. Decided January 29, 1912.

THE UNITED STATES, PLAINTIFF IN ERROR,	}
<i>vs.</i>	
THE BUFFALO PITTS COMPANY, DEFENDANT IN ERROR.	

In error to the Circuit Court of the United States for the Western District of New York.

Before Lacombe, Ward, and Noyes, circuit judges.

NOYES, Circuit Judge (dissenting):

There is a clear distinction between a governmental and a proprietary right. When the United States in the exercise of their sovereign authority appropriate private property, the Constitution guarantees compensation and the law implies a promise to pay, upon which the owner, waiving formal condemnation proceedings, may sue. But when the Government uses property because it claims a title or interest in it, it asserts a proprietary right. If this be asserted

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wrongfully—if the officers of the Government take possession of property in which it has no interest—a tort is committed, but there can be no implication that the Government promises to pay for a thing which it claims to be entitled to without paying.

93 Stated in another way: When the Government takes property in a manner equivalent to informal condemnation proceedings, a recognition of the duty to make compensation must be presumed and may amount to an implied promise to pay. In such a case there is no difficulty in treating the relations of the sovereign and the property owner as contractual. But when the Government uses property which it claims to own or have an interest in, it occupies the position of a private person asserting a private right and just as an individual who takes property which does not belong to him is liable in trespass or trover and not in contract, so whatever liability attaches to the Government officers for a wrongful use is founded in tort. There is nothing to form the basis of a contract.

To illustrate: If the officials had seized this engine because it was available and was a necessary instrument for the prosecution of the public work, there would have been an appropriation by governmental authority from which the law would imply a promise to make payment—such promise being merely the legal recognition of a conceded obligation. But if the officials had used the engine because they claimed that the Government had a title giving it the right to use it, there could be no such implied promise even if in fact it had no title, because in such a case the use would be a disclaimer of any accountability therefor. There would be no meeting of minds.

The difficulty with the opinion of the majority, as I view it, is not in failing to recognize, but in failing to apply, these principles. The opinion seems almost to beg the whole question by stating, without discussion, that “the Government did not claim any title to the engine or deny the plaintiff’s claim.” If the Government did not make a claim of proprietary right and asserted only its governmental authority to take and use the engine in the public work, I certainly could not, consistently with that which has just been written, dissent. But as I read the testimony, the very opposite conclusion to that stated by the majority must be drawn from it. It seems to me entirely clear that the Government officials used the engine because the contract with the defaulting contractors gave the Government the right to use the machinery upon the works and because they claimed that the rights of the Government thereunder were superior to those of the plaintiff as the holder of a chattel mortgage. Thus the chief engineer, to whom the matter was referred, claimed in a letter to the plaintiff that the engine having been delivered
94 and used upon the works by the contractors before the chattel mortgage was filed, was subject to the provisions of the contract. So the district engineer as a witness stated that he claimed the engine under the contract. There is substantially nothing upon the part of the plaintiff to contradict this testimony.

The record is, in my opinion, insufficient to determine whether the contract provision authorizing the Government to take possession of the property of the contractors and continue the work, gave it rights with respect to the engine in question superior to those of the plaintiff as the holder of a chattel mortgage thereon. But upon such a record showing the claims made in behalf of the Government of its rights under the contract, I am wholly unable to comprehend how it can be denied that the Government asserted a proprietary right or can be held that it acted in its sovereign capacity by proceedings equivalent to those of eminent domain.

In my opinion the judgment should be reversed.

95 At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the court rooms in the Post Office Building in the city of New York, on the 8th day of February, one thousand nine hundred and twelve.

Present: Hon. E. Henry Lacombe, Hon. Henry G. Ward, Hon. Walter C. Noyes, circuit judges.

UNITED STATES, PLAINTIFF IN ERROR,

vs.

BUFFALO PITTS COMPANY, DEFENDANT IN ERROR.

Error to the Circuit Court of the United States for the Western District of New York.

This cause came on to be heard on the transcript of record from the Circuit Court of the United States for the Western District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said Circuit Court be, and it is hereby, modified in accordance with the opinion of this court and as so modified is affirmed.

It is further ordered that a mandate issue to the district court in accordance with this decree.

E. H. L.

I rose to deny.

H. G. W.

I concur.

E. H. L.

96 (Endorsed:) United States Circuit Court of Appeals, Second Circuit. U. S. vs. Buffalo Pitts Co. Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed February 8, 1912. William Parkin, clerk.

97 United States Circuit Court of Appeals for the Second Circuit

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
against
 BUFFALO PITTS COMPANY, DEFENDANT IN ERROR.

*To the honorable the judges of the United States Circuit Court of
Appeals for the Second Circuit:*

The petition of the United States of America, by John Lord O'Brian, its attorney in and for the Western District of New York, respectfully shows:

That the appeal herein was argued in the Circuit Court of Appeals for the Second Circuit at the present term thereof, on the 5th day of January, 1912, and that thereafter and on the 29th day of January, 1912, judgment was rendered therein, modifying the judgment of the Circuit Court for the Western District of New York by striking therefrom the amount of interest included therein, and, as so modified, affirming such judgment. The opinion of the court in
98 declaring its judgment was written by Judge Ward and was concurred in by Judge Lacombe; a dissenting opinion was written by Judge Noves.

The plaintiff in error now respectfully applies for a rehearing in said appeal for the following reasons:

1. It appears from the opinion of the court herein that its judgment was largely, if not entirely, based upon the conclusion that the Government did not claim any title to the engine, for the use of which the defendant in error seeks compensation, nor deny the title of the defendant in error to it.

The plaintiff in error most respectfully but earnestly protests that this conclusion finds no sufficient warrant in the record herein. Whatever was done in the premises by the officers or employees of the United States was done by Wendell M. Reed, a district engineer in the Reclamation Service; H. C. Rizer, Acting Director of the Geological Survey; F. H. Newell, chief engineer in the Reclamation Service; and W. H. Llewellyn, United States attorney for New Mexico.

Without here entering into any extended presentation of the details of their respective acts, an examination of the record will clearly disclose that Reed, Rizer, and Newell consistently and uniformly both asserted the paramount right of the Government to take the engine not as a governmental, but as a proprietary right, under the terms of the contract between the United States and the Taylor-Moore Construction Company, and refused to recognize any right of the defendant in error to or in it (pp. 61-63, 35-41, 47, 51-53 printed record on appeal).

The argument before the Circuit Court of Appeals was largely confined to the several legal phases of the case rather than to any thorough presentation of the facts, and it appears altogether probable that counsel for the plaintiff in error in this respect failed to

impress upon the court the significance and importance of these acts, and that for such reason their bearing upon the question was overlooked.

The part taken by the United States attorney for New Mexico in the matter was of no importance either way—he wrote the Attorney General for instructions, including in his letter some expressions of opinion as to the outcome of possible litigation, but the record discloses no reply to his inquiry.

To authorize a recovery in the Circuit Court sitting as a Court of Claims under the jurisdiction conferred by the Tucker Act, the defendant in error was bound to establish that its claim was upon a contract implied in fact—that is, the minds of the parties must have met upon the proposition that compensation would be made for the engine's use by the United States. The evidence clearly establishes that there never was such a meeting.

2. If this court considered itself bound by the findings of fact included in the record, and was led into material error by any insufficiency in them with respect to the facts hereinbefore presented, it is further respectfully suggested that it is well within its powers to grant the application of the plaintiff in error for a rehearing, and pending the same to remand the case to the Circuit (District) Court for more specific findings to show the exact actions taken by and the relations existing between the representatives of the respective parties (*U. S. vs. Kelly*, 89 Fed., 946; *Ripley vs. U. S.*, 220 U. S., 491); and that particularly such requirement for additional findings should specifically include findings:

(a) Whether or not Wendell M. Reed, district engineer of the Reclamation Service, in his first conversation with the representative of the Buffalo Pitts Company on June 16, 1905, and in all subsequent conversations with said representative, took the position that his action with reference to retaining possession of said traction engine would be controlled by the terms of the contract of December 4, 1904, between the United States and the Taylor-Moore Construction Company and stated his belief to said representative that the Government had a perfect right under said contract to retain and use the engine as well as all other equipment formerly in the possession of the construction company for the completion of the work embraced in its contract.

(b) Whether or not, on August 2, 1905, H. C. Rizer, Acting Director of the United States Geological Survey, in response to a letter addressed to the Secretary of the Interior by the Buffalo Pitts Company and referred to that officer for reply, officially advised said company, among other things, that:

Under the terms of said contract, in case of default by the contractor the United States is entitled to the possession of the contractor's machinery delivered on the ground, and if the engine referred to was delivered, the United States has taken possession of it under the terms of said contract.

The remedy of those furnishing labor or materials used by contractors in the prosecution of contracts with the United States appears to be set forth in the act of Congress approved February 24, 1905 (33 Stats., 811).

(c) Whether or not it appears from the evidence that plaintiff below availed itself of the remedy provided by the act of February 24, 1905, by suing the said Taylor-Moore Construction Company and its sureties, or otherwise, to recover the purchase price of said traction engine.

(d) Whether or not, on September 26, 1905, F. H. Newell, chief engineer of the Reclamation Service, addressed a communication to the Buffalo Pitts Company as follows:

"In reference to your letter of August 22, 1905, and to letter from this office of August 30, 1905, advising you that the matter of
102 your claim in connection with an engine furnished the Taylor-Moore Construction Company, under its contract with the Government for construction work under the Hondo project, New Mexico, was referred to the engineer in the field for a statement, you are advised that the engineer in charge reports that the engine was furnished and was in use upon the work before any instrument was filed showing title in any one other than the contractors. Upon default of the contractors, the Government under the terms of the contract which was in force at the time the chattel mortgage is said to have been filed, took possession of all the machinery, tools, and appliances belonging to the contractor upon the ground.

"The status of the machinery in question is the same as that of other machinery, tools, stock, etc., belonging to the contractors and taken over by the Government in pursuance of the express terms of the contract, and until the work is completed and matters under the contract are finally adjusted, no change in the status of the machinery can be made nor claims thereto recognized."

(e) So far as it is a matter of fact and not a conclusion of law, whether or not, at the time of the assignment of said traction engine to the United States by the Taylor-Moore Construction Company on June 7, 1905, the officers and agents of the United States recognized
lawful possession in any one other than the assignor.

103 (f) So far as it is a matter of fact and not a conclusion of law, whether or not, at the time of the assignment of said traction engine to the United States, or at any period subsequent thereto, any negotiations were had between the officers and agents of the United States authorized to act in the premises, and the representatives of the Buffalo Pitts Company, indicating a meeting of the minds of the parties and from which a contract could be implied in fact that the Government agreed and intended to pay said company the reasonable rental value for the use of said traction engine.

(g) Whether or not, on June 4, 1908, Wendell M. Reed, district engineer for the Reclamation Service, addressed an official communication to the Buffalo Pitts Company as follows:

Referring to your request by telephone for information concerning dates of contracts, etc., on Hondo project, New Mexico:

The Taylor-Moore Construction Company assigned to the United States their interest in their contract on the Hondo project, on June 7, 1905, and the United States on that date took charge of all material, supplies, and equipment belonging to them.

The United States entered into contract with Wood, Bancroft & Doty to finish a part of the unfinished work of the Taylor-Moore Co., on November 13, 1905. Wood, Bancroft & Doty finished their contract on June 31, 1906. Since the last-mentioned date the Buffalo Pitts engine under discussion has not been used by the United States or any of its agents.

(h) Whether or not, on September 30, 1905, the United States attorney for New Mexico wrote to the Attorney General as follows:

In this connection I desire to call your attention to the fact that the Buffalo Pitts Mfg. Co. furnished the Taylor-Moore Construction Co. with a traction engine of the value of \$1,600, giving said Buffalo Pitts Mfg. Co. a chattel mortgage on same. The reclamation engineers are using this engine. The Buffalo Pitts Company desire either to have the engine or make some arrangement whereby they may be paid for this sale, and the question is in the event of their attempting to replevy same and take it from the possession of the engineers, whether I should resist it or not. I take it that there could be a redelivery to the engineers and under section 1001, R. S., would not be required to give a bond, and could probably keep possession of the engine for some time and thus enable the engineers to complete the reservoir in question. But would not this subject the Government to a suit which would result eventually in the Government having to pay for the engine? I will thank you to advise me what, in your opinion, would be the correct position for me to take on this question.

(i) Whether or not it appears from the evidence that the

Attorney General, the Secretary of the Interior, or any other qualified officer of the United States, expressly or by implication, authorized the United States attorney for New Mexico to bind the Government by a promise to pay plaintiff for the use of said engine, and whether or not such a promise was in fact ever made.

Wherefore your petitioner respectfully prays that it be allowed to reargue its appeal herein with particular reference to the significant and important bearing of the facts hereinbefore set forth upon the questions here raised, and that pending such reargument the record herein be remanded to the Circuit (District) Court for the Western District of New York with directions to make specific and additional findings in the matters hereinbefore enumerated.

Dated, Buffalo, N. Y., April 22, 1912.

JOHN LORD O'BRIAN,
*Attorney of the United States in and for
the Western District of New York.*

WILLIAM PALMER,
Assistant United States Attorney.

106 I, John Lord O'Brian, United States attorney in and for the Western District of New York, as counsel for the plaintiff in error herein, hereby certify that in my opinion the foregoing application for a rehearing is founded upon good and sufficient grounds and is not interposed for the purpose of delay.

Dated, Buffalo, N. Y., April 22, 1912.

JOHN LORD O'BRIAN,
*Attorney of the United States in and for
the Western District of New York.*

WILLIAM PALMER,
Assistant United States Attorney.

107 At a stated term of the United States Circuit Court of Appeals for the Second Circuit, held at the court rooms in the Post Office Building, city of New York, on the 5th day of May, 1912.

Present: Hon. E. Henry Lacombe, Hon. Henry G. Ward, Hon. Walter C. Noyes, circuit judges.

THE UNITED STATES, PLAINTIFF IN ERROR,	}
<i>vs.</i>	
BUFFALO PITTS COMPANY, DEFENDANT IN ERROR.	}

A petition for a rehearing having been filed herein by counsel for the plaintiff in error:

Upon consideration thereof it is—

Ordered that said petition be, and hereby is, denied.

H. G. W.

(Endorsed:) United States vs. Buffalo Pitts Co. Order. United States Circuit Court of Appeals, Second Circuit. Filed May 6, 1912. William Parkin, clerk.

108 Supreme Court of the United States.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,	}
<i>vs.</i>	
BUFFALO PITTS COMPANY, DEFENDANT IN ERROR.	}

To the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, and to the other justices of the said honorable court, and to the honorable the Supreme Court of the United States:

The United States of America, plaintiff in error, in the United States Circuit Court of Appeals for the Second Circuit, feeling itself aggrieved by the decision of the said Circuit Court of Appeals heretofore rendered in this action on January 30th, 1912, comes now by John Lord O'Brian, attorney of the United States in and for the western district of New York, and complains that in the record

and proceedings had in such cause, as well as in the rendition of said decision and the making of an entry of judgment thereon, divers manifest errors have happened to the great prejudice of the said United States of America, as more fully appears from the assignment of errors herewith presented and submitted by it and filed herein.

Wherefore the said The United States of America prays and petitions for the allowance of a writ of error, and for such other and further order or citation and process as may cause the said errors and each of them to be corrected by the said Supreme Court
109 of the United States.

And your petitioner prays for a reversal of so much of the judgment as is complained of in the assignment of errors herewith presented and for the correction of the errors so complained of, and for such other, further, and proper relief as may be just in the premises, and that a transcript of the record, proceedings, and papers in this case, duly authenticated, may be sent to the Supreme Court of the United States.

And your petitioner will ever pray.

Dated, Buffalo, N. Y., this 20th day of August, 1912.

JOHN LORD O'BRIAN,
*Attorney of the United States in and for
the Western District of New York.*

110 Supreme Court of the United States.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR, }
vs. }
BUFFALO PITTS COMPANY, DEFENDANT IN ERROR. }

Upon motion of John Lord O'Brian, attorney of the United States in and for the western district of New York, and attorney for the plaintiff in error in the above-entitled cause, and upon filing a petition for a writ of error, together with an assignment of errors, it is

Ordered that the writ of error be, and it is hereby, allowed to have reviewed in the Supreme Court of the United States the judgment heretofore affirmed herein by the Circuit Court of Appeals on the 30th day of January, 1912, and that all further proceedings be suspended and stayed until the determination of said writ of error by the said Supreme Court of the United States.

Dated, Buffalo, N. Y., August 20, 1912.

JOHN R. HAZEL,
*United States Judge in and for
the Western District of New York.*

111 (Indorsed:) United States Supreme Court. The United States of America, plaintiff in error, vs. Buffalo Pitts Company, defendant in error. Petition and order. John Lord O'Brian, United States attorney, attorney for plaintiff in error, 405 Federal Building, Buffalo, N. Y. United States Circuit Court of Appeals, Second Circuit. Filed Aug. 29, 1912. William Parkin, clerk.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR, }
 vs. }
 BUFFALO PITTS COMPANY, DEFENDANT IN ERROR. }

Assignment of errors.

And now comes The United States of America, plaintiff in error, and makes and files this its assignment of errors.

1. The United States Circuit Court of Appeals for the Second Circuit erred in refusing to reverse the judgment of the United States Circuit Court for the Western District of New York for the errors committed by it in receiving the testimony offered on the part of the defendant in error by George Hockenbush as to conversations with W. H. H. Llewellyn, United States attorney for New Mexico, tending to establish any agreement that the United States would pay for the use of the engine mentioned by the witness, and by John B. Olusted as to the market value of said engine in the months of May and June, 1905.

2. The United States Circuit Court of Appeals for the Second Circuit erred in refusing to reverse the judgment of the United States Circuit Court for the Western District of New York for the errors committed by it in denying the motion of the plaintiffs in errors to dismiss the bill of complaint herein upon the ground that the defendant in error could not recover herein because at the time of the

113 taking over of the engine by the plaintiff in error the defendant in error was not in possession and was not entitled to possession of the engine and had no right or authority to make or enter into any contract for its use; that the proof of the defendant in error failed to establish any action of the plaintiff in error from which an implied promise to pay for the engine could be found or that those with whom the alleged conversations and transactions occurred had any authority to bind the United States to any such contract or agreement; that the Circuit Court had not jurisdiction of this suit; that there was no competent evidence or proof as to any damages sustained by the defendant in error; that as the taking of the engine by the United States was a lawful taking no action to recover will lie against it.

3. The United States Circuit Court of Appeals for the Second Circuit erred in refusing to reverse the judgment of the United States Circuit Court for the Western District of New York for the error committed by it in making the finding contained in its written decision dated February 27th, 1911, and numbered "VI":

"That on or about the 16th day of June, 1905, at Roswell, New Mexico, the plaintiff by its agent made a demand upon the defendant through Wendell M. Reed, district engineer of the Reclamation Service under the Department of Interior, for the possession of said engine and appurtenances, which the defendant then and there

refused, and thereafter the defendant retained and used said property in the work under said contract until June 21, 1906."

4. The United States Circuit Court of Appeals for the Second Circuit erred in refusing to reverse the judgment of the United States Circuit Court for the Western District of New York for the error committed by it in making the finding contained in its written decision dated February 27th, 1911, and numbered "VII":

114 "That said Wendell M. Reed was during said period, and before and after the same, the local representative of the Government in charge of the work under said contract, at and near Roswell, New Mexico, and as such took possession of said engine and appurtenances for the United States, and thereafter the defendant, by the Director of the United States Geological Survey, to whom the Secretary of the Interior referred said matter, and by the chief engineer and assistant chief engineer of the Reclamation Service, under the direction of said department, ratified and adopted the acts of said Wendell M. Reed, district engineer, in respect to the possession of said engine and appurtenances."

5. The United States Circuit Court of Appeals for the Second Circuit erred in refusing to reverse the judgment of the United States Circuit Court for the Western District of New York for the error committed by it in making the finding contained in its said written decision, and numbered "X":

"That during the use and occupation of the said engine and appurtenances by the defendant the plaintiff, to wit, on or about June 16, 1905, and also on or about September 30, 1905, notified the defendant of the execution and filing of said mortgage as aforesaid and that the plaintiff claimed the said property under the title thereby vested in it and claimed the right of possession because of the default by the mortgagor in the conditions thereof, and that the defendant at all said times well knew of the existence and filing of said chattel mortgage and did not at any time dispute the validity thereof, and on September 30, 1905, represented to the plaintiff that the defendant was using and would continue to use said engine in said work and that any legal proceedings to recover the possession thereof would be resisted and defeated by the defendant, and further represented to the plaintiff that if said property were left in the defendant's possession its attorney would recommend payment by the defendant therefor."

6. The United States Circuit Court of Appeals for the Second Circuit erred in refusing to reverse the judgment of the United States Circuit Court for the Western District of New York for the error committed by it in making the finding contained in its said written decision, and numbered "XI":

115 "That the plaintiff relied upon the fact that its title to the property under the chattel mortgage was not disputed by the defendant and upon the representations made to it as aforesaid,

and consented to defendant's retaining possession of said property in expectation of receiving due compensation therefor."

7. The United States Circuit Court of Appeals for the Second Circuit erred in refusing to reverse the judgment of the United States Circuit Court for the Western District of New York for the error committed by it in making the finding contained in its said written decision, and numbered "1":

"That the plaintiff was the lawful owner of the said property on June 16, 1905, when it demanded the possession thereof from the defendant, and was then entitled to the possession thereof as against the said mortgagor, the Taylor-Moore Construction Co. and its assigns."

8. The United States Circuit Court of Appeals for the Second Circuit erred in refusing to reverse the judgment of the United States Circuit Court for the Western District of New York for the error committed by it in making the finding contained in its said written decision, and numbered "2":

"That after the aforesaid refusal by the defendant of such demand the defendant was liable to the plaintiff under an implied contract to pay proper compensation for the use and occupation of said property."

9. The United States Circuit Court of Appeals for the Second Circuit erred in refusing to reverse the judgment of the United States Circuit Court for the Western District of New York for the error committed by it in making the finding contained in its said written decision, and numbered "3":

"That the defendant is estopped by the conduct of its officers and representatives from denying that the said engine and its appurtenances were the property of the plaintiff."

10. The United States Circuit Court of Appeals for the Second Circuit erred in affirming the judgment of the United States Circuit Court for the Western District of New York as modified by the decision of the said Circuit Court of Appeals entered February 21st, 1912; in finding and deciding that the refusal of the United States to deliver possession of the engine to the defendant in error when demanded raised an implied promise to pay for its use; in finding and deciding that the United States did not claim title to the engine nor deny the title thereto of the defendant in error; and in finding and deciding that the judgment of the United States Circuit Court for the Western District of New York herein was right whether resting on an implied contract to pay or upon the obligation imposed upon the United States by the fifth amendment to the Constitution.

11. The United States Circuit Court of Appeals for the Second Circuit erred in denying the application of the plaintiff in error for a reargument of its appeal herein and in refusing to remand the case to the trial court for more specific findings as to the actions taken by and the relations existing between the representatives of the respective parties hereto as set forth in the petition of the United

States attorney in and for the western district of New York, dated April 22nd, 1912.

Dated, Buffalo, N. Y., August 20, 1912.

JOHN LORD O'BRIAN,
*United States Attorney in and for the
Western District of New York,
405 Federal Building, Buffalo, N. Y.*

117 (Endorsed:) United States Supreme Court. The United States of America, plaintiff in error, *vs.* Buffalo Pitts Company, defendant in error. Assignment of errors. John Lord O'Brian, United States attorney, attorney for plaintiff in error, 405 Federal Building, Buffalo, N. Y. United States Circuit Court of Appeals, Second Circuit. Filed August 29, 1912. William Parkin, clerk.

118 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, clerk of the United States Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 117, inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of The United States against The Buffalo Pitts Company as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the Southern District of New York, in the Second Circuit, this 24th day of September, in the year of our Lord one thousand nine hundred and twelve and of the Independence of the said United States the one hundred and thirty-seventh.

[SEAL.]

WM. PARKIN,
Clerk.

119 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States Circuit Court of Appeals for the Second Circuit, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals, before you, or some of you, between Buffalo Pitts Company, plaintiff, and the United States of America, defendant, a manifest error hath happened, to the great damage of the said defendant, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this

writ, within thirty days from the date hereof, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the honorable Edward D. White, Chief Justice of the said Supreme Court, the 20th day of August, in the year of our Lord one thousand nine hundred and twelve.

[SEAL.]

S. W. PETRIE,
*Clerk of the United States District Court
in and for the Western District of New York.*

Allowed by—

JOHN R. HAZEL,
*United States Judge in and for the
Western District of New York.*

AUGUST 20TH, 1912.

120 (Indorsed:) United States Supreme Court. United States of America, plaintiff in error, vs. Buffalo Pitts Company, defendant in error. Writ of error. John Lord O'Brian, United States attorney for plff. in error, 405 Federal Building, Buffalo, N. Y. United States Circuit Court of Appeals, Second Circuit. Filed Aug. 20, 1912. William Parkin, clerk.

121 THE UNITED STATES OF AMERICA, ss:

To Buffalo Pitts Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed with the clerk's office of the United States Circuit Court of Appeals for the Second Circuit, wherein The United States of America is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable John R. Hazel, United States judge in and for the western district of New York, this 20th day of August, in the year of our Lord one thousand nine hundred and twelve.

[SEAL.]

JOHN R. HAZEL,
*United States Judge in and for the
Western District of New York.*

Attest:

S. W. PETRIE, *Clerk.*

122 *Return on service of writ.*

UNITED STATES OF AMERICA,
Western District of New York, ss:

I hereby certify and return that I served the annexed citation on the therein-named Buffalo Pitts Company by handing to and leaving

a true and correct copy thereof with J. M. Olmsted, vice pres. of said company, personally, at Buffalo, in said district, on the 27th day of Aug., A. D. 1912.

H. L. FASSETT, *U. S. Marshal.*

By MAURICE L. DOTY, *Deputy.*

122 (Indorsed:) Law 303. 2158. United States Supreme Court. United States of America, plaintiff in error, vs. Buffalo Pitts Company, defendant in error. Citation. John Lord O'Brian, United States attorney, attorney for , 405 Federal Building, Buffalo, N. Y. Filed Sept. 3, 1912, at o'c., m. S. W. Petrie, clerk.

(Indorsement on cover:) File No. 23,403. U. S. Circuit Court Appeals, 2d Circuit. Term No. 828. The United States, plaintiff in error, vs. Buffalo Pitts Company. Filed October 23d, 1912. File No. 23,403.

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